

EVIDENTIARY HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	
Application for Certification)	Docket No.
for the Morro Bay Power Plant)	00-AFC-12
Project)	
_____)	

VETERANS MEMORIAL BUILDING
209 SURF STREET
MORRO BAY, CALIFORNIA

TUESDAY, JUNE 4, 2002

9:15 a.m.

Reported by:
James A. Ramos
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

William Keese, Presiding Member

James D. Boyd, Associate Member

HEARING OFFICER AND ADVISORS PRESENT

Gary Fay, Hearing Officer

Michael Smith, Advisor

STAFF AND CONSULTANTS PRESENT

Caryn Holmes, Staff Counsel

Marc Pryor, Project Manager

Susan Lee

Richard A. Anderson

Andrea Erichsen

Jim Buntin

APPLICANT

Christopher T. Ellison, Attorney
Ellison, Schneider and Harris

Andrew L. Trump, Director of Business Development
Western Region
Robert E. Cochran, II, Project Manager
Michael Pollack
Duke Energy North America

Peter Okurowski, Senior Associate
California Environmental Associates

Robert C. Mason, Vice President
TRC

Terry Huffman

INTERVENORS

Robert Schultz, City Attorney
Steven J. Elie, Attorney
Musick, Peeler, Garrett, LLP
City of Morro Bay

Henriette Groot, President
Pamela Soderbeck
Babak Naficy, Staff Attorney
Environmental Defense Center
Coastal Alliance on Plant Expansion

ALSO PRESENT

Carol Tyson, United States Fish and Wildlife
Service

Dan Chia
California Coastal Commission

Garry Johnson

Mandy Davis

Marla Morrissey

David Nelson

Colleen Johnson

Deborah Hillyard
California Department of Fish and Game

Nelson Sullivan

Mike Walgren, Assistant State Park Ecologist
California Department of Parks and Recreation

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P R O C E E D I N G S

9:15 a.m.

PRESIDING MEMBER KEESE: Good morning, everyone. We're here for our fourth set of evidentiary hearings on the siting of the Morro Bay Power Plant.

I'm Bill Keese, Chairman of the Energy Commission, and Chairman of this Siting Committee. Mr. Jim Boyd, Commissioner, is joining us for the first time on these hearings, over to my right. On my left is Mike Smith, my Advisor for these hearings. Our Hearing Officer, Gary Fay, is on my direct right and will be conducting the bulk of the hearings.

I'd like to mention a few things as we get started. I had hoped to start at the crack of 9:00 because I'd like to move this as expeditiously as we can.

We had allowed for three days of hearings, Tuesday, Wednesday and Thursday, and we had left Friday open for our fourth day of hearings. Mr. Boyd and I unfortunately will have to be in San Francisco on Friday, and we will not be able to have hearings on Friday.

We're going to move as fast as we can.

1 We want to get all the evidence in. We hope to be
2 able to cover our subjects in the three days.

3 We have received an objection by CAPE to
4 consideration of the habitat enhancement proposal
5 of Duke. We have received the responses to that.
6 The Committee would like to look at those and we
7 will try to respond this afternoon after the lunch
8 break.

9 Obviously everybody here is well
10 represented. The bulk of time, it looks like it
11 could be trimmed, is in the cross-examination
12 area. I would just suggest that full, appropriate
13 cross-examination, -- full cross-examination is
14 appropriate. Tediousness in that process does not
15 impress the Committee. So, cross-examination that
16 is going nowhere, leading nowhere and winds up
17 getting nowhere is discouraged.

18 With that, Mr. Fay, can we jump in?

19 HEARING OFFICER FAY: Thank you,
20 Commissioner.

21 PRESIDING MEMBER KEESE: Commissioner
22 Boyd, did you want to say anything as we started?

23 COMMISSIONER BOYD: Thank you, Mr.
24 Chairman. Only --

25 PRESIDING MEMBER KEESE: Welcome to

1 Morro Bay.

2 COMMISSIONER BOYD: -- it's a pleasure
3 to be here. I look forward to the next three
4 days.

5 PRESIDING MEMBER KEESE: Thank you.

6 HEARING OFFICER FAY: Thank you. Some
7 preliminary matters. For members of the public,
8 we have comment forms in back. If somebody would
9 like to have their opinions known to the
10 Committee, but don't particularly want to stand up
11 and speak, they can fill out an opinion form and
12 bring it up here during a break.

13 We also have blue cards with which many
14 of you are familiar. If you wish to comment after
15 we finish a topic area, please fill out a blue
16 card. And I'm going to ask Mr. Pryor, the Staff
17 Project Manager, if he could help by gathering
18 these up and bringing them up to us as we conclude
19 a topic area.

20 So if you do want to make some comments
21 on a particular area, fill out a blue card in back
22 and give it to Mr. Pryor in the white shirt back
23 there. And he'll be sure that we get it; and that
24 way we can be sure to call on everybody.

25 Today's hearing was announced through

1 public notice dated May 10th, and it is the fourth
2 set of evidentiary hearings in the Morro Bay Power
3 Plant project case.

4 We had some materials in back, the
5 notice; also an agenda for the hearings; and a
6 copy of the current status of the official exhibit
7 list. And then there was also another document
8 that just says Morro Bay Power Plant at the top;
9 underneath that, underlined, applicant's proposed
10 exhibit list.

11 And it begins with a list provided by
12 the applicant with blanks next to some of the
13 exhibits. And these are items that I assume the
14 applicant plans to offer at some time. The
15 convenience for the people in the audience and the
16 public is that the title's already written down.
17 So once it's identified you can just write the
18 number next to it.

19 We also, as you move through it, page 6
20 is the staff exhibit, and page 7 are some of
21 CAPE's proposed exhibits. After this was compiled
22 we received a further list from CAPE of proposed
23 exhibits. And we were not able to include the
24 City's exhibits, so this is not a complete list.
25 But it may save some time.

1 I'd ask the parties if any of your
2 exhibits are in this document, please refer to the
3 page number of the document as you introduce the
4 exhibit. That way everybody can turn to that page
5 and write the exhibit number next to the title. I
6 think it would save us all some time in keeping
7 track of things.

8 I believe that's all of the preliminary
9 matters. I'd like to begin by taking appearances
10 very briefly. If we could just go around the
11 room, starting with the applicant, Mr. Ellison.

12 MR. ELLISON: Thank you, Mr. Fay. My
13 name is Chris Ellison, Ellison, Schneider and
14 Harris, representing Duke Energy Morro Bay LLC.
15 To my right is Mr. Andrew Trump, who is the
16 Project Director for this project. And we will
17 introduce the witnesses as they appear.

18 HEARING OFFICER FAY: Ms. Holmes.

19 MS. HOLMES: Thank you. My name is
20 Caryn Holmes; I'm the attorney assigned to this
21 proceeding for the Energy Commission Staff. And
22 as Mr. Fay earlier pointed out, Marc Pryor, the
23 Project Manager, is in the back of the room and
24 will be collecting blue cards from anybody who
25 wishes to speak.

1 We have other witnesses that we will
2 identify when they are called to appear.

3 HEARING OFFICER FAY: CAPE.

4 MR. NAFICY: Good morning. My name is
5 Babak Naficy. I work at the Environmental Defense
6 Center and I represent CAPE as to this portion of
7 these proceedings.

8 HEARING OFFICER FAY: And the City.

9 MR. SCHULTZ: Good morning. Rob
10 Schultz, City Attorney for Morro Bay.

11 MR. ELIE: Good morning. Steven Elie,
12 Special Counsel for the City of Morro Bay.

13 HEARING OFFICER FAY: Thank you.

14 MR. ELIE: Mr. Fay, on the exhibit list
15 I did notice that the change that CAPE had
16 suggested on exhibit 192, which is on page 21, has
17 not been corrected on this list, which was the
18 City resolution was sponsored by the City of Morro
19 Bay, not by CAPE.

20 HEARING OFFICER FAY: Okay, thank you
21 for that.

22 MR. ELIE: We just need to have that
23 edited.

24 HEARING OFFICER FAY: On the exhibit
25 list on page 21?

1 MR. ELIE: Correct; exhibit 192.

2 HEARING OFFICER FAY: Thank you. Okay,
3 we're going to begin with alternatives, the CEQA
4 analysis of alternatives. And ask the applicant
5 and staff to keep their direct presentations as
6 brief as possible. And we're going to have to
7 limit cross-examination of all the parties to ten
8 minutes, so that we can make our schedule today,
9 since we lost time in the overall number of days.

10 So, with that understanding, Mr.
11 Ellison.

12 MR. ELLISON: Thank you. The
13 applicant's witness on alternatives is Mr. Robert
14 Mason, who I believe has been previously sworn in
15 this proceeding. Is that correct?

16 HEARING OFFICER FAY: That's true. Mr.
17 Mason, you remain under oath.
18 Whereupon,

19 ROBERT C. MASON
20 was recalled as a witness herein, and having been
21 previously duly sworn, was examined and testified
22 further as follows:

23 DIRECT EXAMINATION

24 BY MR. ELLISON:

25 Q Mr. Mason, could you state and spell

1 your name for the record, please.

2 A Robert Mason, M-a-s-o-n.

3 Q Mr. Mason, do you have the applicant's
4 direct testimony on alternatives that was
5 previously filed in this proceeding?

6 A Yes, I do.

7 MR. ELLISON: Mr. Fay, can I have an
8 exhibit number for that document?

9 HEARING OFFICER FAY: I believe the next
10 number in order is exhibit 195.

11 MS. HOLMES: Can I ask a question of
12 clarification? Are we going to be identifying the
13 entire package as 195, or simply the alternatives
14 portion?

15 HEARING OFFICER FAY: I'd prefer if it
16 was just the alternatives portion.

17 MS. HOLMES: Thank you.

18 MR. ELLISON: That's fine.

19 HEARING OFFICER FAY: And where is that
20 referenced on the proposed exhibit list?

21 MR. ELLISON: Let me refer that question
22 to our document expert, Mr. Okurowski.

23 MR. OKUROWSKI: I do not believe it's on
24 there.

25 HEARING OFFICER FAY: Okay. Could you

1 just give us a title, then?

2 MR. ELLISON: The title is alternatives.

3 HEARING OFFICER FAY: Okay.

4 BY MR. ELLISON:

5 Q Mr. Mason, does exhibit 195 contain a
6 statement of your qualifications, as well as those
7 of the supporting witness, Mr. Pollack?

8 A Yes, it does.

9 MR. ELLISON: And Mr. Pollack has been
10 previously sworn in this proceeding, as well.

11 BY MR. ELLISON:

12 Q Mr. Mason, could you briefly summarize
13 your qualifications, and then, Mr. Pollack, after
14 that I'd like you to state and spell your name for
15 the record and summarize your qualifications.

16 A Yes, I have a bachelor of arts and a
17 masters in urban regional studies from USC. For
18 the past 22 years I've been involved in various
19 projects involving environmental analyses,
20 including the preparation of environmental impact
21 reports, applications for certification, and other
22 environmental documents.

23 In my role as project director I oversee
24 a multidisciplinary staff that evaluates various
25 environmental aspects.

1 And then also I was directly involved in
2 the preparation and analysis of alternatives for
3 the Morro Bay Power Plant project.

4 Q Mr. Pollack.
5 Whereupon,

6 MICHAEL POLLACK
7 was recalled as a witness herein, and having been
8 previously duly sworn, was examined and testified
9 further as follows:

10 MR. POLLACK: My name is Michael
11 Pollack, that's spelled P-o-l-l-a-c-k. I have a
12 bachelor of science degree in mechanical
13 engineering from the University of Florida.

14 I have been in the power industry since
15 I graduated from the University of Florida in 1972
16 and have worked on a variety of power plant
17 projects ranging from traditional coal-fired
18 projects, nuclear projects, circulating fluidized
19 bed projects and various types of combined cycle
20 and simple cycle combustion turbines.

21 My experience has been with a regulated
22 utility, with a consulting engineering firm, BPC
23 contractor and currently with Duke Energy.

24 HEARING OFFICER FAY: Mr. Ellison, let
25 me interrupt you here. If you would, have one of

1 your people give our court reporter a copy of
2 exhibit 195. At least temporarily so he can
3 record all the information on the face of it and
4 get it --

5 MR. ELLISON: We will do that.

6 HEARING OFFICER FAY: -- designation.

7 And I'd like to ask each of the parties to do that
8 when you request that an exhibit be identified.
9 Please hand James a copy. It doesn't mean you
10 lose it forever, but I know he wants to look at it
11 to be sure he gets the information down
12 accurately.

13 Excuse me. Go ahead.

14 MR. ELLISON: Thank you.

15 BY MR. ELLISON:

16 Q Mr. Mason, do you have any additions,
17 corrections or clarifications that you'd like to
18 make to exhibit 195?

19 MR. MASON: Yes, I have three minor
20 corrections. On page 3, the first full bullet
21 item on that page; it has a lined title called the
22 no-project and offsite alternatives would have
23 greater -- sixth line down in that bulleted item
24 it says: Lacks site control for four of them,
25 referring to sites. That should read: And lacks

1 site control for five of them.

2 On page 17, last paragraph on the page,
3 second line, there's a parenthetical reference,
4 indicates see figure 2. That should say see
5 figure 3.

6 And the last correction is on page 35,
7 last paragraph, third line. It reads: Six
8 identified sites in the PSA as alternatives. That
9 should say: Six sites identified in the FSA.

10 Those are my corrections.

11 MR. ELLISON: With those corrections are
12 the facts contained in exhibit 195 true to the
13 best of your knowledge?

14 MR. MASON: Yes, they are.

15 MR. ELLISON: And are the opinions
16 contained therein, do they represent your best
17 professional judgment?

18 MR. MASON: Yes, they do.

19 MR. ELLISON: Do you adopt exhibit 195
20 as your testimony in this proceeding?

21 MR. MASON: Yes, I do.

22 MR. ELLISON: Mr. Mason, could you
23 briefly summarize how you went about analyzing
24 alternatives for this project, and what your
25 conclusions were?

1 MR. MASON: We went through the FSA, and
2 in the FSA it identified the no-project
3 alternative and six alternative power plant sites
4 to compare against the project.

5 As discussed in our more detailed
6 written testimony we submit that that alternative
7 analysis is flawed in several important reasons.

8 One, under the Warren Alquist Act,
9 modification of the existing facility is exempt
10 from the requirement to consider offsite
11 alternatives. Therefore, the project is
12 statutorily exempt from the requirement to
13 consider those.

14 And we believe that under that statute
15 that the Energy Commission has the authority to
16 approve the project at the existing site without
17 reference to alternative sites.

18 Also, under CEQA guidelines an
19 alternative needs to be able to show that it can
20 avoid or substantially lessen significant impacts
21 of a project. We believe that we have shown with
22 substantial evidence in other testimony that all
23 the significant impacts for the proposed project
24 can, in fact, be mitigated to below a level of
25 significance.

1 And therefore, under CEQA there is no
2 need to consider or select a project alternative.

3 Another important aspect of CEQA, of
4 course, is that an alternative must be feasible to
5 obtain most of the basic project objectives. In
6 this case the most basic project objective for
7 this project is the modernization of the Morro Bay
8 Power Plant. Clearly none of the alternative
9 offsite locations can do that.

10 There are important aspects not only for
11 the modernization, itself, but utilizing the
12 existing infrastructure, and also providing
13 significant local benefits to the City of Morro
14 Bay as outlined in the memorandum of understanding
15 and the agreement to lease.

16 And that includes removing the existing
17 tank farm, the stacks, the building. None of the
18 offsite alternatives would allow for those basic
19 objectives to be met.

20 We believe, simply put, that the
21 alternatives to the project are, in fact, not
22 alternatives. They are separate projects.

23 Under CEQA it also indicates that in
24 evaluating offsite alternatives or any other
25 alternative, that the impacts of that alternative,

1 itself, must be analyzed. We believe that the
2 offsite alternatives identified by staff have
3 their own potential to have significant impacts.
4 And in a few minutes I'll go into a little bit
5 more detail on one of the sites that the staff has
6 identified.

7 Within the AFC there was an evaluation
8 of alternatives for the modernization project
9 prepared by Duke Energy. It identified basically
10 four alternatives that were all evaluated in terms
11 of how the plant could be rearranged, either on
12 the site, or different configurations of power
13 generation capability on the site, that would
14 allow for the modernization to proceed.

15 An important aspect again of the power
16 plant project, itself, the modernization project,
17 is optimizing the use of the existing facility.
18 And therefore the project, by definition, is
19 directly and strongly associated with the existing
20 Morro Bay Power Plant site.

21 This is further seen through the City of
22 Morro Bay, local policies and plans that
23 encourages onsite development. The Morro Bay
24 general plan specifically indicates that any
25 expansion of the Morro Bay Power Plant shall give

1 priority to the option that would best utilize
2 available onsite space. Again, we believe that
3 only the project, as proposed, meets that
4 requirement.

5 In evaluating the other alternatives
6 sites, a key is identifying where there might be a
7 feasible alternative. If there was to be an
8 offsite alternative, if it were going to be
9 located in a coastal location, it would have to be
10 on an area or within an area identified by the
11 Coastal Commission as a location suitable for a
12 power plant site.

13 It would have to be located on a site
14 that was either zoned or capable of being rezoned
15 for heavy industrial or coastal dependent
16 industry. It would have to be large enough to
17 support the construction of 1200 megawatts. And
18 it would also have to be a site that could provide
19 or have close access to infrastructure
20 requirements for electrical, gas and water.

21 Based upon those requirements, and based
22 upon the comparison to the proposed project, Duke
23 finds that new environmental impacts would
24 inevitably be associated with any outside
25 alternative because of the need for infrastructure

1 development. The fact that the existing plant is
2 there. And that any type of disturbance and
3 impact would result in new impacts.

4 What I'd like to do at this point is
5 quickly go through just a couple of slides that
6 are directly out of the written testimony that
7 will allow me to summarize this a little bit
8 quicker and we can get about our business here
9 today.

10 If I could have that brought up, I'm
11 going to move over to the mobile mike just very
12 quickly.

13 (Pause.)

14 MR. MASON: As indicated, the slides I'm
15 going to show are directly out of our testimony.
16 In evaluating the various sites that were
17 identified by staff, and there were six of them,
18 Little Morro Creek site, Duke Energy offsite tank
19 farm. And then there were four sites out in the
20 San Joaquin Valley, Avenal State Prison site;
21 Pleasant Valley State Prison site; Lemoore Naval
22 Air Station; and Gates Substation.

23 We went through a process of identifying
24 through this decision tree the basic steps we
25 believe are appropriate for the evaluation of

1 alternative sites.

2 First, again, the project is exempt from
3 the requirements since it is a modernization of an
4 existing power facility. Even with that, going
5 through the CEQA analysis process, would the
6 project result in any significant impact. Again,
7 our evidence that we provided, and within other
8 testimony of which, in most cases, staff has
9 agreed with, shows that the significant impacts
10 from the project can, in fact, be mitigated. So
11 there are no unavoidable adverse impacts.

12 There is also, therefore, none of the
13 alternative offsite locations would be able to
14 either significantly reduce or lessen or avoid a
15 significant impact from the project.

16 Again, we don't believe that any offsite
17 alternatives will meet the basic projective
18 objectives of modernization of the Morro Bay Power
19 Plant site, itself.

20 Continuing on, and I will talk about
21 this in a little bit more detail in relationship
22 to one of the sites, we don't believe that the
23 sites are feasible for a number of reasons,
24 including site availability, infrastructure,
25 suitability of the site.

1 As you continue on through the process
2 and again, what the decision tree shows is that at
3 the end of the day we don't believe any of the
4 alternative sites, in fact, represent feasible
5 alternatives to the project.

6 In addition to these sites, and I do
7 want to digress just for a few minutes regarding
8 the no-project alternative. That was evaluated
9 also by the Energy Commission Staff. We firmly do
10 not understand and disagree with the assumption
11 made by staff that under the no-project
12 alternatives that units 1 and 2 will go out of
13 service in approximately five years.

14 And then in the FSA it also indicates
15 that over a period of six to eight years to ten
16 years, that the existing units 3 and 4, under the
17 no-project alternative, would also similarly drop
18 in their capacity factors for output.

19 There was some information that was
20 provided by Duke in response to a data request
21 that was looking at past performance data. Also
22 indicated in that data response this was not a
23 projection of what would be the capacity factors
24 for Morro Bay in the future, but more, in fact,
25 just information provided on past activities.

1 Duke is on the record, has indicated
2 that under a no-project alternative that units 1
3 through 4 will continue to operate on an
4 indefinite basis. And that with appropriate
5 upgrades and retrofits, could, in fact, continue
6 to operate at very high levels of capacity.

7 So, we disagree with the definition of
8 the no-project alternative as identified by staff.

9 For the purpose of the analysis we
10 grouped the six offsite alternatives into two
11 basic categories. One were near field
12 alternatives; and the second was the San Joaquin
13 Valley sites.

14 Of the near field sites, Little Morro
15 Creek site and the Duke offsite tank farm. CEC
16 Staff found that the Little Morro Creek site is
17 probably better in terms of significant impacts as
18 compared to the project. And that the offsite
19 tank farm site is probably worse.

20 We agree with staff's finding regarding
21 the offsite tank farm, but we disagree with the
22 staff's findings of the Little Morro Creek site
23 may be probably better, in their terms, as
24 compared to the project, itself.

25 I want to go through, based upon that,

1 and talk a little bit about the Little Morro Creek
2 site and our evaluation of that, going through the
3 basic steps, what we see in the decision tree.

4 The first item is to go ahead and take a
5 look again at project objectives. We do not
6 believe that the Little Morro Creek site will meet
7 the basic objective of modernizing the Morro Bay
8 Power Plant. Again, it's not on the site, so it's
9 not tied to modernization at all.

10 We also then took a look in terms of
11 site suitability. As shown on an aerial of this
12 figure 4, again these are right in the testimony,
13 and figure, I believe it's figure 6 of the
14 testimony, as well, the Little Morro Creek site is
15 in an agricultural area. It is also in an area
16 that at least portions are identified in the
17 County general plan as a flood hazard area.

18 There are two drainages that it would
19 cross over that would end up with having riparian
20 impacts, and also it would have potential flood
21 impacts. There would be a need for extensive
22 grading and berming to protect the site from the
23 100-year flood event. And realigning of those two
24 water courses.

25 Therefore, we view this as being a

1 significant riparian habitat impact and a flood
2 impact.

3 Also, from a land use perspective, this
4 area is within the local coastal plan for the
5 County of San Luis Obispo. It's an area
6 identified by the Coastal Commission as not being
7 suitable for the siting of a new power plant or
8 related facilities.

9 Per the Coastal Commission policies, the
10 first preference is for protecting coastal
11 properties, is to site a new plant on sites
12 already approved for power plants. That is, in
13 fact, Duke's approach in terms of modernization of
14 the Morro Bay Power Plant. And the least favored
15 preference from the Coastal Commission is for a
16 new site to be located in areas that are
17 designated as not suitable for a power plant such
18 as Little Morro Creek site.

19 The San Luis Obispo County's energy
20 element, in its coastal plan, also states that the
21 expansion of the facilities on existing sites is
22 preferred and has priority over opening up new
23 areas for use.

24 Therefore, we find the Little Morro
25 Creek site as not suitable for power plant

1 development.

2 The availability of infrastructure.

3 There is the electrical interconnect, gas
4 interconnect, water requirements. They are in the
5 area, but they would require additional
6 disturbance for that.

7 In addition, the existing road out to
8 Little Morro Creek would not be suitable for
9 operations and for construction, so a new road
10 would have to be developed.

11 Regarding the -- obtaining site control,
12 which is another item for feasibility. On the
13 screen it's probably difficult to see, and it
14 really is a hodge-podge. The Little Morro Creek
15 site is actually made up of three different
16 parcels owned by three different people. And Duke
17 finds that it is unreasonable to assume that we'd
18 be able to gain site control. It's difficult
19 enough to gain site control from one person. To
20 think that we'd be able to gain site control from
21 three people, we believe, is speculative and not
22 appropriate. Based upon that, we don't believe
23 that we can obtain site control.

24 Finally, in terms of Little Morro Creek,
25 itself, the use of that site, we believe, would

1 have significant impacts that may not be able to
2 be mitigated. For land use, regarding the
3 riparian area and flood hazard. The biological
4 issues associated with the riparian areas.

5 Visual resources, it would introduce an
6 industrial facility into an area that is now
7 agriculture. That would be highly visible from
8 highway 41, the gateway into Morro Bay. It would
9 also, from the noise perspective, add an
10 industrial noise source into an area that is
11 currently agricultural.

12 Based upon all of this we find that the
13 Little Morro Creek site does not meet the basic
14 project objectives. It's not feasible to site
15 suitability. Inconsistency with the County
16 general plan, the local coastal plan. And the
17 lack of ability to obtain site control. And we
18 also see that it would result in significant
19 impacts.

20 As noted above, and as I talked before,
21 we find the -- and we agree with the offsite tank
22 farm, with staff, that it is not -- it's probably
23 worse. And so we agree with that finding.

24 To wrap this up, in terms of the San
25 Joaquin Valley sites, this is an interesting one

1 from our perspective. We see that those sites are
2 suitable sites on their own merits. But the do
3 not represent an alternative to Morro Bay.

4 They range from 60, 80 miles away. It
5 appears to us that given that there's no nexus to
6 any impact or ability to mitigate impacts for
7 Morro Bay, itself. And in terms of how we
8 evaluated it and took a look at those sites, as
9 the Commission is well aware of, and most of the
10 people in the audience are also aware of, Duke
11 Energy has an AFC in front of the Commission now
12 for an Avenal project. While it is not at the
13 Avenal State Prison site, it is not at the
14 substation site, it's in close proximity to those.

15 It's clear that that's being considered
16 as a separate project. And it would operate with
17 or without this project, and will continue on its
18 own merits. And while the other sites may also
19 represent potentially suitable sites for a power
20 plant, again, they would be viewed, from our
21 perspective, as stand-alone projects that would
22 stand on their own merits and will go forward, but
23 have no direct tie to Morro Bay.

24 It's also interesting from our
25 perspective in that in previous proceedings by the

1 Commission, particularly in Kern County, where
2 there are five combined cycle, baseload power
3 plants that have been permitted by the Energy
4 Commission within the last three, four years, La
5 Paloma, Sunrise 1 and 2, Western Midway Sunset,
6 Elk Hills, they're all located within a 10- to 15-
7 mile radius of each other.

8 In that licensing process for those
9 projects, the CEC did not consider these plants to
10 be alternatives to each other. Rather they were
11 evaluated and licensed as single projects.

12 So we believe that while the four sites
13 identified in the San Joaquin Valley may, in fact,
14 represent simple cycle power plants, they are not
15 alternatives to the Morro Bay project, itself.

16 And again, even if they were to be
17 considered an alternative, it would not meet the
18 basic objective of allowing for the modernization
19 of Morro Bay Power Plant. There's absolutely
20 nothing that would require Morro Bay to go through
21 a process of decommissioning and demolition if one
22 of those four sites would evaluate, and rather,
23 Morro Bay would continue to operate in its
24 existing way through units 1 through 4.

25 Based upon that we do not see that a

1 site out in San Joaquin Valley would substantially
2 lessen or reduce any impact from the existing
3 plant, which we believe, again, are mitigated
4 below a level of significance. And, again, given
5 their distance from Morro Bay, that they are, in
6 fact, separate projects.

7 That concludes my testimony.

8 MR. ELLISON: With that I would move the
9 admission of exhibit 195, together with the
10 exhibits that are incorporated by reference
11 therein. And I would ask Mr. Okurowski to read
12 off those incorporated exhibits and their exhibit
13 numbers.

14 MR. OKUROWSKI: The exhibits listed in
15 the testimony are exhibit 4 for the AFC, in
16 particular, chapters 2, 3 and 5. Exhibit 91,
17 which was contained in the 21-page exhibit list;
18 but, Mr. Fay, I don't see it on your revised list
19 that you handed out this morning. But it is on
20 the other list, so exhibit 91.

21 I'm going to skip the next one on our
22 list and go right to exhibits 36 and 37, and then
23 finally exhibit 52, which, again, Mr. Fay, is in
24 the 21-page list that was mailed out on the 6th of
25 May, but does not seem to be contained in your

1 revised list, at least in the short time I had to
2 look at it this morning.

3 And then we have a new exhibit which in
4 the testimony is unmarked and un-numbered. And,
5 again, Mr. Fay, I don't see it in your list this
6 morning. I only had a short time to go through
7 it. But it is in the testimony, but I don't see
8 it in your new list. And it's entitled, Duke's
9 Evaluation of Alternative Sites Identified by CEC
10 Staff, Morro Bay Power Plant Modernization
11 Project, docketed on April 17, 2002, docket number
12 25-333.

13 HEARING OFFICER FAY: And this was filed
14 separately from the testimony, is that correct?

15 MR. OKUROWSKI: No, this was docketed
16 separately from the testimony, but it was included
17 on the evidence list filed with the testimony.

18 HEARING OFFICER FAY: All right.

19 MR. OKUROWSKI: But it doesn't seem to
20 be on the list that you handed out this morning,
21 that's what I was trying to indicate. It's on the
22 original testimony list.

23 HEARING OFFICER FAY: Right, but it's
24 not been marked --

25 MR. OKUROWSKI: It has not been marked

1 as an exhibit, and I don't --

2 HEARING OFFICER FAY: -- identified at
3 this time. We'll make that exhibit 196.

4 MR. OKUROWSKI: Okay.

5 HEARING OFFICER FAY: And could you
6 provide a copy to the court reporter, please.

7 MR. OKUROWSKI: Yes, sir.

8 HEARING OFFICER FAY: Any objection to
9 receiving those into evidence? All right, I hear
10 none, so we direct those entered into the record
11 at this time.

12 Is the witness available for cross-
13 examination?

14 MR. ELLISON: Yes.

15 HEARING OFFICER FAY: All right. Ms.
16 Holmes.

17 MS. HOLMES: I think in the interest of
18 time we'll forego cross-examination so it can move
19 along more quickly.

20 HEARING OFFICER FAY: Okay, thank you.
21 Appreciate it.

22 Does CAPE wish to cross-examine the
23 witness?

24 MS. SODERBECK: Yes. Pam Soderbeck.

25 HEARING OFFICER FAY: Okay.

1 MS. SODERBECK: Just a few questions.

2 CROSS-EXAMINATION

3 BY MS. SODERBECK:

4 Q In terms of the staff's no-project
5 analysis and the figures that were used, what has
6 been the overall capacity production from the
7 plant so far this year, do you know?

8 MR. MASON: We don't know at this time,
9 but we could check that and respond back after
10 lunch if you would like.

11 MS. SODERBECK: Yes, please. I believe
12 Mr. Trump indicated in the December hearings that
13 for 2001 it was somewhere around 49 percent
14 capacity for 2001. Does that sound right to your
15 panel?

16 MR. ELLISON: If you know.

17 MR. MASON: I'm not familiar with those
18 numbers, but --

19 MS. SODERBECK: Okay.

20 MR. ELLISON: Actually, Ms. Soderbeck,
21 if I could just ask for a clarification to make
22 sure we get you the answer that you're looking
23 for. If you're looking for a percentage, such as
24 what you just gave, that's an annual percentage
25 capacity factor. And obviously --

1 MS. SODERBECK: Exactly.

2 MR. ELLISON: -- we haven't run the
3 year, so could you be clear as to what you're
4 looking for precisely?

5 MS. SODERBECK: Well, at this point you
6 must have some idea of what the capacity level is,
7 at least for the first quarter, the first four or
8 five months. I know there's a shutdown for the
9 refurbishing of unit 3, which would affect that
10 number, I'm aware.

11 But if there's -- I'm just trying to get
12 what the feeling is for how this year is
13 developing in terms of your capacity. Whatever
14 best way you can express that.

15 MR. ELLISON: Okay, we will provide that
16 number. I will say that, as I believe you are
17 aware, there has been maintenance shutdown.

18 MS. SODERBECK: Correct.

19 MR. ELLISON: And with that statement
20 let me ask how would this relate to the no-project
21 alternative? We don't have any problem providing
22 the information, but I'm having a hard time seeing
23 how it --

24 MS. SODERBECK: Well it's my
25 understanding --

1 MR. ELLISON: -- period of time during a
2 maintenance shutdown has any bearing on anything.

3 MS. SODERBECK: Well, it's my
4 understanding that the rest of the plant was shut
5 down, as well, because of lack of demand. At
6 least according to the local paper. I'm just
7 trying to get to the demand levels for this year.

8 MR. ELLISON: I'm just trying to figure
9 out how it relates to the no-project alternative.

10 MS. SODERBECK: It relates to whether
11 the percentages used by staff are proper or not.
12 I believe Mr. Mason said that --

13 MR. ELLISON: Okay, --

14 MS. SODERBECK: -- those assumptions
15 were too low.

16 MR. ELLISON: Understand.

17 MS. SODERBECK: I'll just go on then.
18 If the plant were to run at a 30 percent capacity
19 factor, which is one of the figures that staff
20 used, and assuming that you were correct that
21 units 1 and 2 would continue chugging right along,
22 would that be anticipated to be running throughout
23 the year? Or would that be, for example, periods
24 of shutdown and running at very high levels of
25 capacity during the peak summer months?

1 MR. POLLACK: I don't believe we fully
2 understood your question. Could you restate it or
3 repeat it, please?

4 MS. SODERBECK: Right. One of the
5 percentages, annual percentages that staff is
6 looking at is a 30 percent overall capacity.

7 And what I'm trying to understand is if
8 that were to be the overall capacity of the plant
9 in an ongoing situation, and assuming that you
10 don't shut down units 1 and 2, that everything is
11 still running, would that likely to be even 30
12 percent throughout the year? Or would there be
13 peaks and valleys, perhaps periods of total
14 shutdown, and perhaps maybe 60 percent during
15 summer months?

16 What would the scenario likely to be?

17 MR. POLLACK: I would expect that the
18 scenario would likely be that units 3 and 4 would
19 likely run more frequently than units 1 and 2.
20 They are the more efficient units.

21 But, I would expect that all units would
22 be operational during the peak summer months at
23 the higher capacity factors. I wouldn't expect
24 that the unit would run at 30 percent for the
25 entire year every single day. There will be peaks

1 and valleys.

2 MS. SODERBECK: Okay, thank you. Mr.
3 Mason, are you an attorney?

4 MR. MASON: No, I'm not.

5 MS. SODERBECK: Are you providing expert
6 legal opinion on your CEQA analysis in your
7 testimony?

8 MR. MASON: I am providing expert
9 testimony from my professional experience in CEQA
10 analysis for alternatives, yes.

11 MS. SODERBECK: Thank you. If the no-
12 project alternative were to occur there'd be no
13 need for a rerating of the transmission line,
14 correct?

15 MR. MASON: Yes, that's correct.

16 MS. SODERBECK: And how much would Duke
17 save in costs if that were to be the case? If you
18 didn't have to rerate?

19 MR. MASON: The rerating of the
20 transmission line in the modernization case is a
21 relatively small expenditure in relation to the
22 overall cost of the project. It's basically an
23 analytical exercise that PG&E will execute.

24 MS. SODERBECK: As I recall from prior
25 hearings, and I apologize, I haven't looked this

1 up again, but it seemed to me that the figure was
2 somewhere between \$1 and \$2 million to have that
3 rerate study done for PG&E, that you'd be paying
4 PG&E? Which I understand is a very small
5 percentage of your overall costs.

6 MR. POLLACK: I believe that number
7 sounds extremely high. I can recheck again, I'll
8 be happy to recheck that --

9 MS. SODERBECK: Okay.

10 MR. POLLACK: -- number and give you an
11 exact number after lunch.

12 MS. SODERBECK: Okay. Are those, at
13 this point in time, sunk costs? Have they already
14 been paid? Or would those be saved if the project
15 did not go forward?

16 MR. POLLACK: Those costs would be
17 saved. They have not been paid to PG&E. We did
18 pay PG&E a relatively small sum to do an initial
19 study. I believe the number was less than
20 \$100,000.

21 MS. SODERBECK: Okay, thank you. Mr.
22 Mason, is it Duke's position that not having site
23 control in and of itself makes all the alternative
24 sites, except the tank farm, infeasible?

25 MR. MASON: Particularly in the case in

1 what I testified was regarding the Little Morro
2 Creek site.

3 MS. SODERBECK: Where there were three
4 owners?

5 MR. MASON: That's correct.

6 MS. SODERBECK: Right. What about the
7 others?

8 MR. MASON: We have not evaluated in
9 detail the sites in San Joaquin, because again,
10 our position is that they do not represent
11 alternatives to the project. They are separate
12 projects. So we did not evaluate issues about
13 site control for those four sites.

14 MS. SODERBECK: Okay. You mentioned in
15 the Little Morro Creek site testimony that the
16 location being an agricultural site was, in fact,
17 a negative. But aren't many of the projects that
18 are ongoing, including some of Duke's, located in
19 agricultural areas, specifically to keep them away
20 from residential areas?

21 MR. MASON: When we take a look at it in
22 terms of as an alternative to Morro Bay Plant, we
23 believe being in an agricultural area is a
24 negative, given that Morro Bay is an existing
25 industrial facility. And, again, the project is

1 defined as modernization of the existing.

2 So, in comparing Little Morro Creek site
3 to the Morro Bay Plant site, we see that as a
4 negative.

5 MS. SODERBECK: Is it Duke's position
6 then that there can be no alternative site, since
7 any other site, by your definition, would not be a
8 modernization of this site?

9 MR. MASON: Yes.

10 MS. SODERBECK: Not just particular ones
11 that staff picked out, but you're saying no other
12 site anywhere?

13 MR. MASON: It is our position that
14 there is no alternative site that would allow for
15 the basic objective of modernizing the Morro Bay
16 Power Plant; that we do not see that there's a
17 site that is feasible that would allow that to
18 happen if it is not the Morro Bay Power Plant.

19 MS. SODERBECK: Is there an energy
20 penalty in transporting electricity from Morro Bay
21 to the Valley?

22 MR. ELLISON: I'm sorry, could you be a
23 little more specific what you mean by an energy
24 penalty?

25 MS. SODERBECK: Well, it's my

1 understanding that there's some loss of --

2 MR. ELLISON: Are you talking about
3 transmission losses?

4 MS. SODERBECK: Transmission loss,
5 right.

6 MR. ELLISON: Okay.

7 MS. SODERBECK: Sorry about not getting
8 the terminology right, but that's what I'm talking
9 about, yeah.

10 MR. ELLISON: Well, I just wanted to
11 make sure that we were talking about the same
12 thing, that's all.

13 MR. POLLACK: We would have to check
14 into that. There's naturally, it's common
15 knowledge that anytime you transport power through
16 an electrical transmission line there are losses.
17 To determine exactly what that loss is and how
18 it's evaluated on a business perspective, I, at
19 this point in time, don't have the answer to that
20 question.

21 MS. SODERBECK: Okay. Is Duke's
22 prediction of the existing plant's long-term
23 viability based on its prediction regarding peak
24 and baseload electrical demands that are being
25 similar to the 2000/2001 period?

1 MR. ELLISON: I'm sorry, which -- you
2 mentioned a prediction. Is there something
3 specific in the testimony you're referring to?

4 MS. SODERBECK: Prediction is probably
5 not the right word. You would talk about the
6 staff's capacity estimates as being understated,
7 that you believe will operate overall at higher
8 levels than the 59, 39 and 30 percent, if the old
9 project were to continue, I believe was the
10 testimony, correct?

11 MR. MASON: What I testified was that
12 the 59, 39 and 30 percent capacity factors was
13 information that Duke had provided in a data
14 response to an Energy Commission data request.

15 It was based upon providing information
16 for previous years. It was specifically indicated
17 in our testimony that that information was not
18 appropriate to use to try to forecast what might
19 be capacity factors in the future.

20 So, our testimony indicated that we felt
21 it was inappropriate for the FSA to use the 59,
22 39, 30 capacity factor in the way it was used in
23 the FSA to indicate their definition of the no-
24 project alternative as basically a turndown of
25 units 3 and 4 over time.

1 So, our testimony was solely that we
2 felt that that information and those percentages
3 had been used in a way that was not intended in
4 our data response.

5 MS. SODERBECK: And those percentages
6 were, in fact, based on at least the 2000 year
7 capacity, correct? I believe the 59 came from the
8 year 2000, and the 39 came from the three-year '98
9 to 2000, and the 30 percent came from 1990 to
10 2000, is that correct?

11 MR. MASON: If you give me a minute, I'm
12 looking at the data response, itself, to see if
13 I'm able to determine that your supposition --

14 MS. SODERBECK: Yeah, I've got page --
15 exhibit 36 for everybody else.

16 (Pause.)

17 MR. MASON: Evaluating the data request,
18 and specifically this was, again it was exhibit
19 36, it was a data request dated February 9, 2001.
20 Data request letter 23.

21 Within that data response it indicates
22 that for the three-year period 1998 through 2000
23 that three-year average period was a 39 percent
24 capacity factor.

25 And that the operation and the level of

1 experience in calendar year 2000 was at 59
2 percent. And it appears also that regarding the
3 30 percent, it was an average from 1990 through
4 the year 2000.

5 MS. SODERBECK: All right. I'm trying
6 to understand why Duke does not think those are
7 appropriate figures, or high or low for the
8 forecasting purposes that staff used them.

9 MR. MASON: Again, as indicated in our
10 testimony and as indicated in the data request to
11 our data response to letter 23, is that there are
12 such a wide variety of factors, including such
13 things as hydroelectric output, major plant
14 outages, weather-related demands, that while we
15 can provide information regarding past
16 performance, to use those factors and variety of
17 factors to try to project into the future is not
18 appropriate.

19 I think that from the position of the
20 way the plants are dispatched that the plant will
21 run as it needs to, based upon a number of
22 factors. They can be used in terms of historic
23 perspective in taking a look at what has happened
24 in the future -- in the past, and what relevance
25 that may have in the future, they may or may not

1 be relevant.

2 But there are a variety of factors that
3 make it inappropriate to try to forecast future
4 use based upon past use.

5 MS. SODERBECK: Would there be any
6 reason for you to believe that the old plant will
7 again reach the 59 percent operating level?

8 MR. MASON: Could you repeat the
9 question, please?

10 MS. SODERBECK: Is there any reason you
11 believe that the old plant would, at any point in
12 the future, again reach the 59 percent operating
13 level?

14 MR. POLLACK: There's no reason at this
15 point in time that we would not expect it to at
16 some point in time, reach that operating level.
17 As can be seen from the events over the last six
18 months to a year, the marketplace, energy
19 marketplace is subject to a number of changes.

20 And what happens in the future is
21 something we're simply not able to predict at this
22 point in time.

23 MR. ELLISON: Actually, just to clarify
24 the record, Mr. Pollack, I believe you used a
25 double negative in your response, and I just want

1 the record to be clear.

2 I believe you said that there's no
3 reason that you know of that the plant would not
4 at some point achieve that capacity factor. And
5 when you remove the double negative, that would be
6 essentially saying that you think that it will at
7 some point achieve that capacity factor. Could
8 you just clarify what you meant -- I just want to
9 make sure we have a clear record here as to what
10 you were saying.

11 MR. POLLACK: That is correct. It is my
12 expectation that sometime in the future we will
13 see this plant achieve those same capacity
14 factors, and possibly even more.

15 MS. SODERBECK: Clearly Duke knows its
16 cost in running the old plant. At what price
17 level megawatt basis will it no longer be
18 profitable or reasonable to assume that you're
19 going to continue running that?

20 MR. ELLISON: I'm going to object to
21 that question on a couple of different grounds.
22 First of all, let me say that while Duke, in its
23 testimony of these witnesses and their testimony,
24 did make some comments about staff's forecast,
25 they did not make a forecast of their own.

1 And these questions in some ways, I
2 think, go beyond the scope of the direct testimony
3 in asking about forecasts that these witnesses did
4 not make, and are not prepared to respond to.

5 Secondly, when you get into these
6 questions of prices, these are not the Duke
7 witnesses that would be -- and again, this goes to
8 the fact that it goes beyond the scope of their
9 testimony. These are not the Duke witnesses that
10 would have that information or that would be
11 appropriate to answer that question.

12 And lastly, to some extent, depending on
13 what you're looking for, this may get into issues
14 of proprietary information.

15 So, on all of those grounds I would
16 object to the question.

17 HEARING OFFICER FAY: We're going to
18 sustain that. And, Ms. Soderbeck, I'd like to
19 just have you wrap it up.

20 MS. SODERBECK: That was my last
21 question.

22 HEARING OFFICER FAY: Oh, was it? Okay.

23 MS. SODERBECK: My only comment would be
24 in the context of having raised feasibility, that
25 does present, you know, cost and profitability

1 issues in an of itself, which is why I was raising
2 the testimony.

3 HEARING OFFICER FAY: I understand.

4 Okay, we'll move to the City, then. Do you have
5 any cross of --

6 MR. SCHULTZ: No questions.

7 HEARING OFFICER FAY: No questions, all
8 right. Good. Any redirect, Mr. Ellison?

9 MR. ELLISON: No.

10 HEARING OFFICER FAY: Okay. Is the
11 staff prepared to go forward?

12 MS. HOLMES: Staff is ready. Staff's
13 witness on alternatives is Susan Lee. She needs
14 to be sworn.

15 HEARING OFFICER FAY: Please swear the
16 witness.
17 Whereupon,

18 SUSAN LEE
19 was called as a witness herein, and after first
20 having been duly sworn, was examined and testified
21 as follows:

22 MS. HOLMES: Thank you. Mr. Fay, staff
23 has testimony on alternatives in the FSA part
24 three, which has not yet been identified as an
25 exhibit. And --

1 HEARING OFFICER FAY: Because the FSA
2 part three is consecutively numbered, I have no
3 problem just taking it all as a single exhibit.

4 MS. HOLMES: Similarly, we filed
5 rebuttal testimony on May 24th, and it was also
6 sequentially paginated. So perhaps it would be
7 easier just to give one exhibit number to the FSA
8 and one exhibit number to the rebuttal testimony.

9 HEARING OFFICER FAY: Yes, separate
10 exhibit numbers. And so the FSA will be exhibit
11 number 197; and the staff rebuttal on alternatives
12 will be exhibit 198. And could you please make
13 copies of those available?

14 MS. HOLMES: I can get copies of the
15 cover pages to the court reporter.

16 DIRECT EXAMINATION

17 BY MS. HOLMES:

18 Q Ms. Lee, do you have in front of you a
19 copy of the alternatives portions of exhibits 197
20 and 198?

21 A Yes, I do.

22 Q And was that testimony prepared by you
23 or under your direction?

24 A Yes.

25 Q And is there a copy of your

1 qualifications contained in exhibit 197?

2 A Yes, there is.

3 Q Do you have any corrections to make to
4 your testimony at this time?

5 A No.

6 Q Are the facts contained in your
7 testimony true and correct?

8 A Yes.

9 Q And do the opinions represent your best
10 professional judgment?

11 A Yes, they do.

12 Q Do you adopt this testimony as your
13 testimony today?

14 A Yes.

15 Q Could you please provide a brief summary
16 of both your direct and rebuttal testimony for the
17 Committee?

18 A Yes. The purpose of the alternatives
19 analysis that we prepared was to comply with CEQA,
20 considering whether there were alternatives to the
21 proposed project that could both meet the project
22 objectives, as defined in the FSA, and avoid or
23 lessen one or more of the significant impacts of
24 the proposed project.

25 We first identified four project

1 objectives, which were first, the construction and
2 operation of a merchant power plant to serve the
3 San Luis Obispo region efficiently and reliably.

4 Second, the generation of approximately
5 1000 megawatts.

6 Third, the location near a key
7 infrastructure, which is transmission, water and
8 gas.

9 And fourth, the ability to maintain
10 local reliability along the San Luis Obispo County
11 coast.

12 After identifying project objectives, we
13 looked at the FSA for the conclusions of each of
14 the environmental and engineering disciplines.
15 And noted that a potentially significant impact is
16 identified in aquatic biological resources.

17 After defining both the objectives and
18 the potential impacts of the proposed project, we
19 looked at a range of alternatives that could be
20 considered.

21 We first looked at alternative
22 technologies. These were described in the FSA but
23 not analyzed in detail. And included geothermal,
24 solar, wind, hydroelectric, biomass, coal and
25 nuclear power.

1 We looked at a variety of smaller or
2 upgrade alternatives, including a smaller power
3 plant at the existing site; partial upgrade
4 alternatives; and configuration alternatives.
5 These were also not evaluated in detail.

6 The alternatives that we did look at in
7 detail, and the no-project alternative, as
8 required by CEQA, and six alternative sites.

9 The no-project alternative, as has been
10 discussed earlier today, is a scenario in which
11 electricity generation from the Morro Bay Power
12 Plant would decline in the future. The
13 assumptions in this alternative were based on the
14 age of the existing plant and the expected
15 increasing difficult competing with newer and more
16 efficient plants around the state.

17 Some impacts under the no-project
18 alternative would be reduced. For example, there
19 wouldn't be construction impacts; impacts on water
20 resources and aquatic biology would be reduced
21 with less production. Other impacts with the no-
22 project alternative would be greater than the
23 proposed project. For example, the noise and
24 visual impacts of the existing facility would
25 remain.

1 We looked at six alternative sites.

2 These were identified based on public comment in
3 two cases, and on staff research in other cases.
4 None of these sites are located along the coast,
5 and none would use once-through cooling.

6 Two of the sites are in the Morro Bay
7 area, the Morro Creek site and the tank farm
8 alternative. And four sites were identified in
9 the Central Valley. Those sites were identified
10 because that's the location where the power from
11 the Morro Bay Plant is delivered into the state's
12 electricity grid.

13 Based on the screening level of analysis
14 that was done for each site, the FSA concludes
15 that all six sites are likely to be feasible for a
16 power plant. We list advantages and disadvantages
17 for each site. No site is found to be without
18 disadvantages.

19 Each of the six is further from a
20 population center than the existing site. And
21 each one would eliminate potential impacts to
22 aquatic biological resources.

23 Two of the sites, Morro Creek and Gates,
24 are found to have the best potential to eliminate
25 the impacts of the proposed project. However,

1 additional investigation would be required to
2 further define impacts at any alternative site.

3 The rebuttal testimony that we filed
4 addressed only the issue of the sites that were
5 identified from the Energy Commission Staff's
6 peaking studies. Duke's testimony addressed the
7 fact that the Central Valley sites were not all
8 identified in the peaker studies, when, in fact,
9 the four sites from the peaker studies were all
10 taken from staff reports, some that were not
11 published, but they were staff assessments done
12 for each of those four sites.

13 That's it.

14 MS. HOLMES: Thank you. The witness is
15 available for cross-examination. Would you prefer
16 to have us move the exhibit, the alternatives
17 portion of the exhibit in at this time?

18 HEARING OFFICER FAY: Is there any
19 objection? All right, then we'll enter exhibit
20 197 and 198 into the record at this time.

21 Mr. Ellison, questions?

22 MR. ELLISON: We do have a few
23 questions.

24 //

25 //

CROSS-EXAMINATION

BY MR. ELLISON:

Q As long as we've been discussing the no-project alternative, let me start with that and ask you to refer to page 4-11 of your direct testimony, exhibit 197.

You referred to a forecast that staff has made, and you've heard CAPE ask some questions about this forecast regarding how the existing project would operate in the future without modernization, is that correct?

A Yes.

Q This forecast that you've put forward here is a staff forecast based on your independent judgment, correct?

A That's correct.

Q And this is not a forecast that Duke presented to you, correct?

A That's correct.

Q You relied upon a data response from Duke about a range of historic operations?

A That's correct.

Q Okay. With respect to the forecast that you've made here, I note that you are assuming a capacity factor of 59 percent for units 1 through

1 4 through 2006, is that correct?

2 A Yes, that's correct.

3 Q And then in 2006, notwithstanding the 59
4 percent capacity factor, units 1 and 2 are closed,
5 is that correct?

6 A Yes.

7 Q Could you explain why you believe that
8 Duke would close units 1 and 2 when the four units
9 together are operating at a 59 percent capacity
10 factor?

11 A The no-project description really is a
12 speculative description based on, as we discussed
13 earlier, historic production factors. We didn't
14 do a specific analysis looking at necessarily when
15 1 and 2 may close, versus 3 and 4.

16 What we were trying to do is look at
17 history and try and project what could happen in
18 the future in order to evaluate potential impacts
19 of this project not occurring.

20 So, there's not engineering analysis of
21 what's going on specifically with units 1 and 2
22 versus 3 and 4. What we were trying to project is
23 what could be a feasible scenario for future
24 operation.

25 Q And under that forecast, after 2010 you

1 assume that units 3 and 4 operate at approximately
2 a 30 percent capacity factor for the indefinite
3 future, is that correct?

4 A That's correct.

5 Q Let me ask you to turn to page 4-1 of
6 the direct testimony, and specifically to the
7 third paragraph of the introduction. Do you see
8 that?

9 A Yes.

10 Q You state there in the third sentence,
11 quote, "It is unclear whether demolition of the
12 tank farm and existing plant would occur if the
13 proposed project were denied and one of the
14 project alternatives were constructed at a
15 different site." Do you see that?

16 A Yes.

17 Q Let me ask you then, with that in mind,
18 to refer to your table 3 at page 31 -- I'm sorry,
19 it is labeled 31, but it's 4-31, I guess would be
20 the appropriate -- have you found that table?

21 A Yes.

22 Q Two of the sites in the right-hand
23 column are listed as potentially better,
24 specifically the Morro Creek alternative and the
25 Gates Substation alternative, is that correct?

1 A That's correct.

2 Q In examining those two alternatives, did
3 you assume that in conjunction with the building
4 of a power plant at either of those sites, that
5 Duke would proceed with demolition of the tank
6 farm at the existing plant at the Morro Bay site?

7 A I believe so, yes. I think that's
8 stated earlier in the FSA.

9 Q So you are testifying that you believe
10 it would be potentially better for Duke to build
11 one or the other of these two sites in conjunction
12 with demolishing the tank farm and the existing
13 Morro Bay project?

14 A That's correct.

15 Q If you were to make the assumption that
16 construction of a power plant at either of these
17 sites would not involve demolition of the tank
18 farm and the existing Morro Bay project, would
19 that change your conclusion?

20 A It definitely would be a different
21 situation, certainly, if the plant here were still
22 to operate in conjunction with these plants,
23 because the impacts of the plant then would not be
24 going away, and that's what we're comparing to.
25 We're comparing the impacts of the existing plant

1 with the impacts of this plant at a different
2 location.

3 Q So would it be fair to say that if you
4 would make the assumption that the existing plant
5 remains and operates, that the addition of a power
6 plant at either of these two alternative sites
7 would not lessen any significant impacts, is that
8 a fair assumption?

9 A I think it would depend on the way that
10 the existing plant would operate in the future.
11 You know, the remaining of the facility, itself,
12 is basically a visual impact. But the operation
13 has a whole range of impacts that really would
14 need to be analyzed one by one, depending on the
15 scenario under which it operated.

16 Q If you were to assume the future
17 operation that we discussed a moment ago and you
18 assumed in your testimony, would it be fair to say
19 that the addition of a power plant at either of
20 these locations, plus the continued operation of
21 the Morro Bay Power Plant would not result in any
22 reduction of significant impacts from the status
23 quo?

24 A From the status quo, meaning today's
25 baseline?

1 Q Yes.

2 A Yeah, I think that's accurate.

3 Q So in that case wouldn't it be fair to
4 say that these two alternatives would be
5 potentially worse?

6 A Well, as I said, I haven't analyzed the
7 impacts of these alternatives essentially
8 cumulatively with the proposed project, so that's
9 something that basically isn't covered in the FSA.

10 I'm not sure I'd want to answer that
11 definitively without really thinking through the
12 scenario in more detail.

13 Q Well, you just testified a moment ago
14 that that scenario would not lessen any
15 significant impacts, do you recall that answer?

16 A Yes.

17 Q Given that it would not lessen any
18 significant impacts, wouldn't you agree that it
19 would be potentially worse?

20 MS. HOLMES: Excuse me, I think you're
21 mischaracterizing her testimony. She stated that
22 it would not lessen -- she was talking about as
23 the plant is operating today. Not as it would
24 operate in the future under the no-project
25 alternative. That is a valid distinction. So if

1 you could make that clear when you ask your
2 question that would be helpful.

3 MR. ELLISON: Well, I recall the answer
4 differently, so I'm going to re-ask.

5 BY MR. ELLISON:

6 Q I believe that I asked you to assume
7 that the plant operates in the future in
8 accordance with the forecast that you made in your
9 testimony.

10 A Um-hum.

11 Q Do you have that assumption in mind?

12 A Yes.

13 Q Okay. Making that assumption, and
14 further assuming an additional power plant at
15 either of these two sites, my question is would
16 you not agree that that scenario does not lessen
17 any significant impacts relative to the status
18 quo, the baseline condition?

19 A Yes, I agree.

20 Q Okay. Now, with that understanding that
21 it does not lessen any significant impact relative
22 to the baseline condition, wouldn't you agree that
23 the preliminary comparison would be potentially
24 worse?

25 A I think that's a possible conclusion.

1 But, as I said, I haven't really analyzed that in
2 the FSA. Because, again, the assumption in this
3 case was that the existing plant would be
4 demolished.

5 Q Well, I note that you've used the word
6 potentially in front of these categories, and I'm
7 using the words potentially worse here, as well.
8 You've testified that it would not lessen any
9 significant impacts. Well, it certainly couldn't
10 be better.

11 A That's correct.

12 Q So again that it couldn't be better, the
13 remaining alternatives are neutral and worse,
14 isn't that correct?

15 A Yeah, I agree that it is the potential
16 that it could be worse.

17 Q Okay. Now, let me ask you about this
18 assumption that Duke, if it built at these
19 locations, would nonetheless proceed to demolish
20 the tank farm and the existing project. Is there
21 any requirement that you know of that would compel
22 Duke to do that?

23 A No.

24 Q Is there any commercial reason that you
25 know of that Duke would do that?

1 A I don't know Duke's operating
2 requirements. I don't think I can make that
3 judgment.

4 Q Well, the existing Morro Bay Power Plant
5 is a viable power plant, you've testified to a
6 forecast under the no-project alternative, that it
7 would continue to operate into the indefinite
8 future, correct?

9 A That's correct.

10 Q Do you know of any commercial reason
11 that a company would demolish a viable power plant
12 when it didn't need to?

13 A No.

14 Q You testified a moment ago that you made
15 the assumption that Duke would, nonetheless,
16 demolish the power plant if it built at one of
17 these alternative sites.

18 Let me ask you about that scenario with
19 respect to the alternative sites in the Valley.

20 First, my understanding is that those
21 sites are, you know, 60 to 80 miles away from
22 Morro Bay, is that approximately correct?

23 A That's correct.

24 Q If Duke were to demolish the Morro Bay
25 Power Plant and replace it with a power plant 60

1 to 80 miles away, the generation of power 60 to 80
2 miles away would have a different impact on the
3 electrical system, would it not?

4 A Yes, it would.

5 Q Have you examined, for example, the
6 consequences for voltage support in the Morro Bay
7 area from that scenario?

8 A No, I haven't. Could I just make the
9 point regarding my previous answer, though, that
10 while it would have a different impact on the
11 system that power that's being generated right now
12 does, aside from the local power along the San
13 Luis Obispo coast, does go through the Gates
14 Substation which is really the focus of the
15 alternatives that we looked at in the Valley.

16 Q But the power plant also serves local
17 reliability needs, does it not?

18 A Right.

19 Q And, in fact, the plant has, at some
20 occasions in the past, been designated by the ISO
21 to run precisely to provide that kind of local
22 voltage support, correct?

23 A I'm not aware of that.

24 Q Is it fair to say, though, that you have
25 not analyzed what the voltage support consequences

1 would be from demolishing this plant and replacing
2 it with one 60 to 80 miles away?

3 A That's correct.

4 Q The only other power plant in this
5 vicinity, apart from -- or significant power plant
6 in this vicinity apart from Morro Bay Power Plant,
7 is Diablo Canyon, correct?

8 A That's correct.

9 Q And as a nuclear project Diablo Canyon
10 occasionally goes down for routine maintenance,
11 refueling, that sort of thing, correct?

12 A That's my understanding.

13 Q If you were to demolish the existing
14 Morro Bay project and replace it with a power
15 plant in the Valley, during those times when
16 Diablo Canyon would be down there would be no
17 significant generation in this vicinity, correct?

18 A Aside from the plant in the Valley. In
19 this immediate vicinity, you're correct.

20 Q Have you analyzed the electric
21 reliability consequences to this central coast
22 region of not having any generation during those
23 times?

24 A No.

25 Q CAPE asked a question a few minutes ago

1 about transmission losses. If you were to build a
2 project in the Valley you would have to incur
3 transmission losses to bring that power to this
4 vicinity, correct?

5 A That's correct, but those same losses
6 occur when you're selling power from here to Gates
7 Substation, which is where 70 percent of the
8 current power is going.

9 Q So it's your understanding that 70
10 percent of the current power goes out to the
11 Valley through Gates, and 30 percent serves local
12 loads, is that your understanding?

13 A That's what I was told by Duke, yes.

14 Q Thirty percent of the existing capacity
15 is roughly 300 megawatts, correct?

16 A That's correct.

17 HEARING OFFICER FAY: Mr. Ellison, I
18 have to ask you to wrap it up.

19 MR. ELLISON: Okay, I have one other
20 topic I want to discuss.

21 HEARING OFFICER FAY: Keep it brief,
22 please.

23 MR. ELLISON: I will be as brief as I
24 can.

25 //

1 BY MR. ELLISON:

2 Q I'd ask you to turn to 4-2 where you
3 discuss the project objectives.

4 A Yes.

5 Q Let me ask you first with regard to the
6 second bullet -- well, first of all, let me ask
7 you, these are not the project objectives that
8 Duke provided to you, correct?

9 A Correct.

10 Q The staff has elected to describe the
11 project objectives in its own way, differently
12 than Duke, correct?

13 A Yes. These are our definition of
14 objectives, that's correct.

15 Q All right. With respect to the second
16 bullet you speak to replacement of capacity of the
17 existing plant. Now Duke's proposal would not
18 only replace that capacity, but would increase it
19 by 200 megawatts, and provide 200 megawatts of
20 peaking capacity, correct?

21 A That's correct.

22 Q Would you not agree that that's a
23 significant difference between just replacing the
24 existing capacity versus adding 200 megawatts of
25 peaking capacity to it?

1 A It's a significant difference in terms
2 of generation, but in terms of looking at
3 alternatives, looking at a 1000 megawatt site
4 gives us the same range of alternatives that we
5 would have had, I think, looking at a 1200
6 megawatt site.

7 Q But you do understand that at least from
8 Duke's perspective the project includes, as an
9 objective, having that additional peaking
10 capacity, correct?

11 A Yes.

12 Q Would your analysis have been different
13 had you assumed the provision of that peaking
14 capacity as an objective of the project?

15 A No, I don't believe so.

16 Q Why then did you exclude it?

17 A I think we were just looking for a way
18 to define objectives of a plant in such a way that
19 would give us a basic understanding of objectives
20 that could be applied to plants across the board.

21 Q Okay, let me ask you to turn -- these
22 are my last, hopefully short, one or two
23 questions. Let me ask you with respect to the
24 last bullet.

25 Here you speak of the objective that

1 Duke has described of modernizing the existing
2 site, correct?

3 MS. HOLMES: I'm sorry, where are you?

4 MR. ELLISON: I'm on the final bullet on
5 that same page, 4-2.

6 MS. LEE: My last bullet says local
7 electric reliability. Could you read the bullet
8 you're talking about?

9 MR. ELLISON: That's interesting, we
10 have different testimony.

11 MS. LEE: There's a paragraph that
12 begins with --

13 MR. ELLISON: Oh, I'm sorry, --

14 MS. LEE: -- Duke's, that's not --

15 MR. ELLISON: -- we are on the same
16 paragraph, but I was reading the latter part of
17 it, which I think is the heart of it.

18 MS. LEE: Okay, that's actually a
19 separate paragraph. The bullet, itself, ends with
20 "electric system losses" and maybe the paragraph
21 return doesn't show in the --

22 MR. ELLISON: It doesn't, okay.

23 MS. LEE: Okay.

24 MR. ELLISON: All right.

25 //

1 BY MR. ELLISON:

2 Q Let me ask you to refer to the
3 discussion beginning: The applicant's objectives
4 also include use of the existing site.

5 A Right.

6 Q Now, you discarded that as an objective
7 for your analysis, correct?

8 A That's correct, because it wouldn't
9 allow looking at any alternative sites at all.

10 Q And you state that you did this because
11 that would exclude alternatives that you believed
12 would address impacts of the project, correct?

13 A I'm not sure it was because of impacts,
14 in particular. Could you ask that question again?

15 Q Well, let me refer you to the sentence:
16 However, while there are clearly advantages to
17 using the existing infrastructure, there are also
18 potential environmental impacts in continued
19 operation at the existing site, as documented in
20 the FSA. Therefore, staff did not include the
21 applicant's objective of use of the existing site
22 in this analysis."

23 I read that to say that because there
24 are potential environmental impacts of using the
25 existing site, you've excluded that as an

1 objective. Is that a fair summary of what you're
2 saying?

3 A I think that's one of the reasons;
4 that's not the only reason, I think, that we
5 looked at alternative sites basically. We looked
6 at alternative sites because it gives you a better
7 sense of comparing the use of this site versus the
8 uses of other sites that are not coastal or not in
9 the center of Morro Bay.

10 Q Is it your understanding, and I know
11 you're not a lawyer, I'm not asking for a legal
12 conclusion, I'm just asking for your understanding
13 of CEQA as you applied it here, since that's what
14 you're doing.

15 Is it your understanding of the
16 alternatives provisions of CEQA that if an
17 objective of the project -- for the purposes of
18 this question I want you to assume it's a
19 legitimate objective of the project -- if a
20 legitimate objective of the project constrains the
21 alternatives analysis, and excludes certain
22 alternatives that might reduce impacts, that it's
23 appropriate to discard that objective?

24 A I'm not sure there can be agreement on
25 what is defined as a legitimate objective. I've

1 worked on many projects where there has been
2 disagreement between the applicant and the agency
3 on what a legitimate objective is.

4 Q Let me ask you to assume that this is,
5 by whatever terms you want to assume it, okay,
6 assume that the Commission has decided that
7 whatever objective this is, is a legitimate
8 objective of the project. Okay? So just put that
9 aside. It's a legitimate objective.

10 Now, the question I'm asking is if a
11 legitimate objective of the project constrains the
12 alternatives analysis, excludes certain
13 alternatives that might reduce impacts, is it your
14 understanding under CEQA that you can discard that
15 legitimate objective in order to reach those
16 alternatives?

17 A No I think if it is determined to be a
18 legitimate objective, then it should be used as a
19 guide to define objective alternative sites.

20 Q Okay, is it then your opinion that
21 modernization of this site is not a legitimate
22 objective?

23 MS. HOLMES: I'm going to have to
24 object. I don't know what -- I want clarification
25 of what you mean by legitimate objective. Are you

1 asking her whether or not she determined it was or
2 it wasn't?

3 MR. ELLISON: Yes.

4 MS. HOLMES: I'm puzzled. I think her
5 testimony is quite clear on that point.

6 HEARING OFFICER FAY: Going to overrule
7 the objection, but I would like counsel to clarify
8 the question so that the witness can answer.

9 MR. ELLISON: The witness just answered
10 that it is not appropriate to exclude a legitimate
11 objective of the project simply because it would
12 constrain the alternatives analysis.

13 So my follow-up question is does she
14 believe that modernization of this site is not a
15 legitimate objective.

16 I think that's what she seems to be
17 testifying to. She's excluded it as an objective,
18 having testified that you cannot exclude a
19 legitimate objective. Ergo, I think what she
20 is -- I'm just trying to clarify that what you're
21 saying is the modernization of this site is not,
22 in your opinion, a legitimate objective
23 recognizable under CEQA.

24 MS. LEE: It's not an objective that we
25 have essentially adopted for this alternatives

1 analysis.

2 BY MR. ELLISON:

3 Q I understand you haven't. I'm trying to
4 understand why.

5 A I think part of the rationale, and it's
6 discussed in here, is that the plant, itself,
7 under the proposed project is planned to be
8 demolished. That, to some extent, seems to open
9 the idea if you're going to reconstruct an entire
10 new power plant, the locations of that plant can
11 be freely evaluated in terms of these objectives.

12 Q You do understand that the plant is
13 proposed to be demolished only to allow the
14 construction of a new plant at this site? It's
15 not being proposed to be demolished for any other
16 reason, correct?

17 A That's correct, I understand.

18 Q And so I really do want to wrap this up;
19 I'm not trying to take any more time than we need
20 to, but let me just ask the question again.

21 Do you believe that modernization of
22 this site is somehow not a legitimate objective
23 that needs to be recognized under CEQA?

24 MS. HOLMES: I'm going to object again.

25 Asked and answered. She's answered it twice now.

1 MR. ELLISON: Well, I disagree. I don't
2 think she has answered it.

3 HEARING OFFICER FAY: No, I think we
4 need a specific answer. I think the question is
5 specific. And if your answer is that staff just
6 decided not to include that, that's fine. I would
7 just like to understand staff's position on why
8 they did not include modernization.

9 MS. LEE: Okay. I think, as I just
10 stated, we understand that the proposed project
11 includes demolition of the plant and construction
12 of a new plant. But in the objectives that we've
13 defined in this FSA we have not included
14 modernization specifically as an objective.

15 And this is consistent with analyses
16 that have been done, for example, for Moss Landing
17 and other Commission proceedings.

18 MR. ELLISON: Okay, let me just say for
19 the record that Duke objected on this exact
20 grounds to the same sort of alternative site
21 analysis in Moss Landing.

22 Duke's position, just to summarize it
23 quickly, is that modernization of existing power
24 plants is a legitimate objective, and that can
25 only be done at a specific site. And that

1 therefore, and we've done -- I'm not going to
2 summarize it, but you'll see the statutory
3 analysis that we've done -- and we believe that
4 the Warren Alquist Act specifically recognizes
5 modifications to existing facilities. And we
6 believe says that you don't have to do a pointless
7 alternative site analysis when the only place that
8 you can modernize the site is at the site.

9 So, having said that, we're done.

10 HEARING OFFICER FAY: Thank you. CAPE,
11 any questions of the staff?

12 MS. SODERBECK: Yes, just a few.

13 CROSS-EXAMINATION

14 BY MS. SODERBECK:

15 Q Again going to the efficiency figures
16 that you were using, capacity figures, I should
17 say, in your forecast or projection, those all use
18 the year 2000.

19 Do you believe the year 2000 is
20 unusually high compared to most other years?

21 A I'm not qualified to make that decision
22 I don't think.

23 Q All right, well, let me ask you a
24 hypothetical. If the year 2000 were less, and let
25 me just give you these figures and other people

1 can check my math, but I believe if you exclude
2 the year 2000 the capacity figures, the highest
3 would be 33 percent, 29 percent and 27 percent.
4 The latter are pretty close to your 30 percent
5 level anyway.

6 So, if you assumed that there's a
7 straight 30 percent, not a declining 59, 39, 30,
8 would your analysis change in terms of the
9 relative impacts of the no-project alternative
10 versus the proposed project?

11 A I'm not sure I understand the question.
12 You're saying if we started in the 30s and --

13 Q -- assume that it was just --

14 A -- 59?

15 Q Yeah. If you started with the 30
16 percent.

17 A The analysis would remain, because the
18 analysis in this case is somewhat qualitative,
19 based on the fact that it's a speculative
20 scenario, I think the comparative impacts would
21 remain fairly similar.

22 Q I had one question on the -- you refer
23 in the testimony, and I apologize, I don't have
24 the page right in front of me, but it indicates
25 that the no-project alternative could be

1 potentially less, I think it was less reliable and
2 that it would have higher energy costs associated
3 with it.

4 Let's see if I can find that real quick.

5 MS. HOLMES: There's a reference to
6 higher energy production costs on page 4-12.

7 MS. SODERBECK: Right.

8 BY MS. SODERBECK:

9 Q That's what I'm referring to.

10 A It's just a function of efficiency.

11 Q That was going to be my question. If
12 they're -- it's my understanding there have been a
13 number of new peaker facilities which I think was
14 Mr. Baker, as I recall, on staff early on in
15 December in the efficiency hearings, said that
16 those are about 40 percent efficiency factors for
17 those.

18 Would you expect the new plant to be
19 able to, I mean the old plant, if it carried on as
20 is, to be able to out-bid those new facilities?

21 A Oh, I don't know.

22 Q So there's a possibility that there
23 might not be any impact on energy costs if we're
24 in an efficiency market and the existing plant is
25 just not up to the efficiency standards of the

1 rest in the market?

2 A I'd say that's a possibility, but I
3 couldn't predict it in detail.

4 Q Okay. Also on page 4-12, looks like the
5 third bullet, you compare as to the -- if SCR is
6 used at the existing plant, that there would be
7 larger quantities of ammonia.

8 Are you referring to larger quantities
9 than they have today? Or larger than the new
10 plant, which clearly will have SCR be running well
11 above these capacity levels that we're talking
12 about with the existing plant?

13 A I believe it's larger than today, the
14 numbers that are here, or the statement.

15 Q Okay, so it's not really comparing the,
16 in this case it's not really comparing the
17 existing plant, no-project alternative, with the
18 proposed plant?

19 I guess my only point is I think the SCR
20 is inevitable whether the old plant stays, if they
21 want to keep operating at any general capacity
22 level.

23 A Because the new plant would have SCR
24 regardless.

25 Q Right. Okay, thank you. Are any of

1 your predictions here based on the assumption that
2 Duke's NPDES permit for the existing plant would
3 be, I should say are the predictions based on the
4 assumption that the -- water permit would be
5 unchanged going into the future?

6 A I think that's the assumption here, is
7 that there would not be different assumptions.

8 Q Okay, thank you.

9 HEARING OFFICER FAY: All right. I'd
10 like to ask the City how much time they anticipate
11 cross-examination?

12 MR. SCHULTZ: As long as it takes me to
13 tell you no questions.

14 (Laughter.)

15 HEARING OFFICER FAY: That's excellent.
16 Okay. We will take a ten-minute break and get
17 right back on the record.

18 Ms. Tyson from U.S. Fish and Wildlife
19 Service is here and has to leave by 1:00, so we
20 intend to shift to taking their comments to
21 accommodate her.

22 See you in ten minutes.

23 (Brief recess.)

24 HEARING OFFICER FAY: Back on the
25 record. We're commencing with the topic of

1 terrestrial biology. We will hear the applicant's
2 direct testimony, and then we will hear comments
3 from Ms. Tyson, who is from the U.S. Fish and
4 Wildlife Service.

5 So we're slightly out of order on that,
6 but then once Ms. Tyson completes her comments,
7 we'll begin with cross-examination of the
8 applicant's witnesses.

9 Mr. Ellison.

10 MR. ELLISON: Okay, that's fine with the
11 applicant. I do, just for the record, want to
12 make-- there's no redirect on alternatives?

13 MS. HOLMES: That's right.

14 HEARING OFFICER FAY: That's right, Ms.
15 Holmes --

16 MR. ELLISON: Okay, and no public
17 comment?

18 HEARING OFFICER FAY: Thank you for
19 reminding me. Is there any public comment on
20 alternatives?

21 All right, could you come up to the
22 mike, please. We have a card from Garry Johnson.

23 PRESIDING MEMBER KEESE: You don't have
24 to fill one out.

25 MR. JOHNSON: Oh, you don't, okay.

1 PRESIDING MEMBER KEESE: Well, it's
2 helpful to us, but I was just --

3 HEARING OFFICER FAY: Mr. Johnson.

4 MR. JOHNSON: Garry Johnson, resident of
5 Morro Bay. Just got a couple comments to make
6 about alternative energy.

7 My background, metallurgical engineer;
8 also a minor in geology. I'm a native
9 Californian, been living in the state for 64
10 years. I've been through it all, as far as
11 earthquakes and storms, droughts, et cetera and et
12 cetera.

13 Also worked for Rockwell International
14 in Orange County as working in the semiconductor
15 industry. Working on alternative energies such as
16 silicon technology for solar cells, et cetera.

17 Silicon does have its point in
18 alternative energies, but it's a very limited
19 resource, but it's an important resource.

20 The way I look at this, studying
21 environmental geology and all this, in our studies
22 there at CalPoly State University, living in San
23 Diego, L.A., Bay Area and now retired here, Morro
24 Bay, I feel that first of all with other energies
25 we produce, whether it's our automobiles or power

1 plants, they have to meet requirements.

2 As I understand, after studying this
3 issue for five years now in Morro Bay, going over
4 this whole Duke Energy facility, it does meet the
5 state requirements, which is very important.

6 But let's look at the overall picture.
7 We get a certain percentage of our power from
8 Idaho, Wyoming, Washington, Oregon, part of that
9 grid system. Those states are growing rapidly the
10 same as California. We're growing at a very rapid
11 rate, thousands of people are moving in this state
12 every year.

13 We also have another problem that
14 exists, since 9/11, is terrorist activities. If
15 we lose any of those dams or so forth, whether
16 it's under drought and they can't produce enough
17 power, or the states grow at a rapid rate, they
18 can't sell power to the state, we're going to be
19 in serious trouble.

20 Because without power we can't exist.
21 If this power shut down in this room this
22 meeting's over with.

23 To me, California has about five
24 different regions and producing alternative
25 energies in all of these regions. To me, on the

1 coast, it's very important to have this
2 alternative energy, producing it, including water
3 from the ocean. The same thing as dry energy in
4 the middle of the state for our hydroelectric
5 plants that we have and so forth.

6 So my opinion is that we should go ahead
7 with this new plant so we do have a good resource
8 in case we can't get power from other states, or
9 go into a serious drought like we had in the early
10 '90s, I believe it was, that some of our
11 hydroelectric plants couldn't produce the power
12 they needed for this state.

13 Let's look at the overall picture 50
14 years from now. We're going to be in serious
15 trouble because we are now. Because of the amount
16 of growth in this state and the thousands of
17 people needing energy.

18 I bought 25 acres up at Point Arena
19 where I was going to retire. I went to
20 alternative energies, to solar cell technology and
21 also wind generator. Within four years, after
22 spending \$10,000, I couldn't keep the 24-volt
23 batteries running very well, and then the sea air
24 completely demolished my wind generator.

25 So I eventually went to PG&E, along with

1 the other people that were so anti against energy,
2 they ended up going to PG&E, too.

3 So, in summary, I feel we should go
4 ahead with this facility and get on with it.
5 Thank you.

6 HEARING OFFICER FAY: Thank you, Mr.
7 Johnson. Mandy Davis.

8 MS. DAVIS: Hello, it's nice to see you
9 again. My name is Mandy Davis. And I'll try to
10 recognize you guys this time, and not make the
11 mistake I did last time.

12 It was real interesting. This morning I
13 was having -- is this on -- I was having --

14 PRESIDING MEMBER KEESE: You've got to
15 get real close.

16 MS. DAVIS: Okay, is that better? I was
17 having coffee this morning, and I guess I have to
18 lean over like that other guy did -- I was having
19 coffee this morning and somebody asked us, well,
20 what if you guys get your way, you know, you don't
21 want the new power plant, and you know, what
22 happens if that old power plant stays.

23 And it was perfect timing for them to
24 ask me that question. It really got me thinking
25 about this. And we've been talking about it this

1 morning.

2 And, you know, Duke, through this entire
3 process, has been maintaining that their new plant
4 is going to be so much better for the environment
5 and for everybody than the old plant, if that one
6 were to stay.

7 They've gone to -- matter of fact,
8 they've gone as far as to tell the public that
9 there is no plant alternative. Well, of course,
10 there is a no-plant alternative. If you guys tell
11 them that it's not acceptable, that they cannot
12 build this new plant, especially with the current
13 cooling system that they have proposed, then, you
14 know, they've got to look at that. Whether or not
15 they want to do dry cooling, or whatever it is
16 that they are mandated.

17 But there is a no-plant alternative.
18 So, what they've done with the public is this:
19 They've maintained that the new plant is going to
20 be cleaner, smaller and better.

21 Well, number one, we already know, by
22 all the data, it's not going to be cleaner. The
23 ground level concentrations of pollutants will go
24 up. We know it won't be smaller because the
25 footprint obviously is larger.

1 So how's it going to be better? It's
2 not is what it boils down to. And they're going
3 to lead the public to believe that they're putting
4 this plant in because it's so much better for the
5 environment. And that they have all these
6 wonderful altruistic reasons to put this in.

7 Well, I'm sorry, these guys don't give a
8 rat's fanny about the public, about the
9 environment. What they do care about, and let's
10 get right down to it, is why do they want to put a
11 new plant in. Because it's going to make them
12 more money. And why do they perceive it's going
13 to make them more money is because if they
14 continue to run, and this, you know, I beg your
15 pardon if I seem to be looking at this from a
16 really simplistic standpoint, I'm a layman, but
17 when you get right down to it what we're looking
18 at baseline are some pretty simple facts here.
19 Some simple things that are going on.

20 Why do they want to spend so much money
21 to put a new plant in if the old plant isn't going
22 to make them enough, or is going to become
23 increasingly less efficient. And will be probably
24 running on a lower percentage basis on a yearly
25 basis, you know, in the future.

1 So, if that's the case, if they can't
2 build the new plant and the old plant stays, and
3 they'll probably end up running it less and less,
4 the efficiency level will go down, and you know, I
5 can't even begin to believe that they would want
6 to build a new plant, not unless that were the
7 case.

8 So, if you're to look at long-term
9 benefits of the no-plant alternative versus the
10 new one, the new one's going to run at a pretty
11 high percentage. It'll be taking in as much, if
12 not a little bit more, water than the current one
13 is. Therefore, destroying the estuary at a much
14 more rapid rate.

15 It seems to me, and this is not
16 necessarily my choice, but if they are only
17 allowed, or if they decide just to keep the old
18 plant, that it at least, from a long-term basis,
19 it would be better for our environment, from an
20 air standpoint, from an estuary standpoint.

21 So, you know, I just don't buy these
22 guys saying this, especially to the public. They
23 most assuredly are not altruistic in their reasons
24 for wanting to do this. We all know that, and I
25 thought it was about time somebody said that.

1 Then if you start looking at the other
2 alternatives they mention, the fact that this
3 plant, or this project has been called a
4 modernization is incredibly ludicrous. And they
5 base, the fellow's not even here, but he was
6 sitting right there, he said that there are no
7 alternatives that are acceptable because none of
8 them would be a modernization. They'd all be a
9 new plant.

10 The reality is this is a new plant, and
11 we all know it is. It has a completely different
12 footprint. The only thing that's allowing them to
13 call it a modernization is utilizing the old
14 cooling system, which is antiquated; it destroys
15 the environment, et cetera.

16 So, for them to say that they cannot
17 even look at any of the alternatives and accept
18 them as such, is ridiculous. And I'm really
19 getting a little tired of hearing about the
20 modernization when we all know it's a new plant.

21 So, what I'm telling you is this, and I
22 know you've heard this from me in a variety of
23 occasions, that I would prefer that there be,
24 actually my preference is that this plant weren't
25 even here. And I've never ever said that to you

1 guys, but if they are not allowed, or they don't
2 do the new plant, I still think that the old plant
3 would be preferable from an environmental
4 standpoint.

5 If you mandate that they are to use dry
6 cooling in the new plant, from an environmental
7 standpoint, that would be the absolute best. So
8 there are alternatives, and I'm really getting
9 tired of hearing from these guys that there
10 aren't.

11 Thanks.

12 HEARING OFFICER FAY: Thank you. Marla
13 Morrissey.

14 MS. MORRISSEY: I'm Marla Morrissey; I
15 live in Los Osos and I wanted to address a
16 component of alternatives, which is energy
17 conservation.

18 I am leasing a electric car which
19 qualified me for an E9 meter; that's a time-of-use
20 meter. And I wanted to share with you a little
21 bit about how that's changed my use of energy in
22 my home.

23 I'm rewarded for using energy from
24 midnight to 7:00 a.m., and on weekends. And so I
25 started using a lot of my, not just to charge the

1 car, but also my dishwasher and washing and
2 whatever I can in offpeak hours.

3 And I'm almost at the end of my three-
4 year lease for the vehicle. It will be turned in
5 soon. But I learned a lot. And I wondered, with
6 the infrastructure that we have in the state, why
7 all Californians can't benefit from this time-of-
8 use meter. It rewards people using energy at
9 offpeak hours. And I think it could go very far
10 in helping the whole picture.

11 I don't know how this ties in exactly
12 with the Duke modernization, but there is a
13 component of new plants in our state having
14 alternatives like time of use fits in as a
15 component. And I hope the CEC will give that
16 opportunity to all Californians as soon as you
17 possibly can.

18 Thank you.

19 HEARING OFFICER FAY: Thank you.

20 PRESIDING MEMBER KEESE: Thank you. If
21 you're around during one of the breaks, we should
22 talk, because I agree. I don't think it's
23 relevant here, but we have a very strong program
24 in that subject, and I'd be happy to tell you
25 about it.

1 MS. MORRISSEY: I'll look forward to
2 talking with you. Thank you.

3 HEARING OFFICER FAY: David Nelson.

4 MR. NELSON: Hi, my name's David Nelson
5 and I'm a resident of Morro Bay. Having just sat
6 through this alternative section I'm a little
7 baffled why the Morro Bay tank farm is part of
8 this power plant. Didn't have a little bit more
9 focus on it.

10 Now, here's a place that will get the
11 power plant up a few hundred more feet into the
12 air. The stacks will naturally be higher. It'll
13 be up in the hill. It will be visible from the
14 highway, but you'd have to know it was there to
15 actually see it, you know.

16 There's a little bit of infrastructure
17 that you're going to have to build to go up there
18 and do that, but it seems to me that, and I've
19 just come back from a dry cooling symposium in San
20 Diego, and dry cooling works. And it's a viable
21 alternative to using the cold water from our
22 estuary to make energy.

23 So, I don't know why more focus wasn't
24 given on the tank farm. And it is part of the
25 Duke property already, so there's no buying of

1 land. The land is probably pretty contaminated
2 because it's been a tank farm for many many years,
3 and nobody really knows what's gone on up there
4 anyway.

5 So, it might be just an ideal site for
6 this power plant, seeing you're going to build a
7 new power plant anyway. So, you know, I know that
8 that part of the hearing is probably closed, and
9 it won't be revisited, but it's kind of
10 disappointing to me that, you know, real
11 consideration wasn't given to that particular
12 site.

13 The other thing that I was wondering was
14 the contention was made that 30 percent of the
15 power from this power plant goes to sustain our
16 County. Now, just doing the rough math on 30
17 percent of what they make there, it's more power
18 than our County probably uses. So I'm wondering
19 where that number may have come from. But, that's
20 what I have to say on that.

21 And like I say, it's too bad that we
22 didn't look at that. And the reason I believe an
23 alternative site needs to be had was this plant
24 was put here 50 years ago during war mentality.
25 And, you know, the regulations weren't in place to

1 protect the estuary. Not only weren't they in
2 place, even when they did come into place, nothing
3 happened.

4 We're here today with almost no research
5 on what the once-through cooling has done to this
6 estuary. We've gone through 20 or 30 years of
7 permitting process that was supposed to keep track
8 of what was going on. But at the end of this
9 process we come and we get our first 316B study
10 just because we're proposing a new plant.

11 So, you know, the regulatory system
12 didn't work here. And what we have here is one of
13 the last estuaries in California that can actually
14 be saved. There's a lot of talk about
15 sedimentation and other problems with this. But
16 don't think for a minute that the power plant
17 isn't part of the problem. It's not the whole
18 problem, I wouldn't stand here and say it was.
19 But it is a part of the problem that needs to be
20 looked at.

21 And the Army Corps is looking at ways to
22 take care of the siltation problem. And
23 unfortunately, the biggest problem was that man
24 decided that we didn't need that extra tidal wash
25 where the outfall is presently located, and they

1 put a roadway across to the Rock.

2 But the Army Corps of Engineers, in
3 their recent studies, are studying the notion to
4 take that out and get this tidal wash working to
5 save this estuary. This is a very special place,
6 and we've made energy here for 50 years. And 50
7 years ago it was a public utility so we were all
8 benefitting from the destruction of this. But now
9 it's a private utility, and I don't think that we
10 can afford to keep doing this.

11 So that's why alternative sites really
12 should be explored. Thank you.

13 PRESIDING MEMBER KEESE: Thank you.

14 HEARING OFFICER FAY: Thank you. Mr.
15 Pryor, any more --

16 MR. PRYOR: No, sir.

17 HEARING OFFICER FAY: All right. That
18 concludes public comment on alternatives. And now
19 I'll ask Mr. Ellison if -- offers his direct --

20 MR. ELLISON: Okay, let me just --

21 HEARING OFFICER FAY: -- go by --

22 MR. ELLISON: -- I just want to make
23 sure that our timing is going to work out here,
24 because I understand Ms. Tyson has a constraint
25 and has to be, I believe has to leave by 1:00.

1 I'm assuming that if we need to go to
2 12:15 or something, that that's not a problem in
3 terms of lunch?

4 HEARING OFFICER FAY: What I would like
5 to do is take your direct; and then go right to
6 Ms. Tyson.

7 MR. ELLISON: Correct.

8 HEARING OFFICER FAY: And not have lunch
9 until after that time.

10 MR. ELLISON: Okay. I just wanted to
11 make sure nobody made a commitment for lunch or
12 something, because that's fine with us.

13 Okay, applicant calls as witnesses on
14 terrestrial biological resources, Dr. Terry
15 Huffman.

16 HEARING OFFICER FAY: I believe Dr.
17 Huffman has previously been sworn, is that
18 correct? And, of course, you remain under oath.

19 MR. ELLISON: I believe that's correct.
20 Whereupon,

21 TERRY HUFFMAN
22 was recalled as a witness herein, and having been
23 previously duly sworn, was examined and testified
24 further as follows:

25 DIRECT EXAMINATION

1 BY MR. ELLISON:

2 Q Dr. Huffman, do you have a copy of
3 Duke's prefiled direct testimony on terrestrial
4 biological resources in front of you?

5 A Yes.

6 MR. ELLISON: I would ask that that be
7 identified as the next exhibit in order.

8 HEARING OFFICER FAY: I believe that --
9 that will be exhibit 199.

10 BY MR. ELLISON:

11 Q And, Dr. Huffman, do you also have a
12 copy of Duke's rebuttal testimony filed in this
13 proceeding with respect to terrestrial biological
14 resources?

15 A Yes.

16 MR. ELLISON: And here let me ask,
17 because of the way our rebuttal is done, we again
18 have the choice of marking the entirety of Duke's
19 rebuttal or marking it topic-by-topic.

20 HEARING OFFICER FAY: It would help me
21 to mark it topic-by-topic.

22 MR. ELLISON: Okay. In that case I
23 would ask that the terrestrial biological
24 resources portion of the rebuttal be marked as
25 exhibit 200.

1 HEARING OFFICER FAY: That will be
2 exhibit 200.

3 BY MR. ELLISON:

4 Q Dr. Huffman, were exhibit 199 and
5 exhibit 200 prepared by you or at your direction?

6 A Yes.

7 Q Do you have any additions, corrections,
8 clarifications you'd like to make to those
9 exhibits?

10 A Yes.

11 MS. HOLMES: I'm sorry, just for a
12 moment, Mr. Ellison.

13 MR. ELLISON: Yes.

14 MS. HOLMES: Exhibit 199, is that the
15 applicant's errata to terrestrial biology
16 testimony, or is it the prefiled testimony? We
17 had been assuming that it was the applicant's
18 errata, since it was --

19 HEARING OFFICER FAY: It was all
20 inclusive, wasn't it?

21 MS. HOLMES: It's all inclusive, and so
22 we have not been working off of the terrestrial
23 biology portion that was filed with the rest of
24 the direct testimony. Am I missing something?

25 MR. ELLISON: No. I think that's --

1 MS. HOLMES: So it's not entitled
2 terrestrial biological resources, it's applicant's
3 errata to terrestrial biological resources?

4 MR. ELLISON: Correct.

5 MS. HOLMES: Thank you.

6 BY MR. ELLISON:

7 Q Dr. Huffman, do you have additions,
8 clarifications, corrections to exhibit 199 or 200?

9 A Yes.

10 Q Would you describe them, please.

11 A Yes, I have corrections to the
12 terrestrial biology testimony errata. On page 24,
13 second paragraph, under temporary footbridge
14 subheading. There's reference to one-hundredth of
15 an acre of riparian habitat. The one-hundredth of
16 an acre should be changed to two-hundredths of an
17 acre.

18 On page 53, last sentence in the
19 paragraph, under section labeled page 315, again
20 there's reference to one-hundredth of an acre.
21 That should be changed to two-hundredths of an
22 acre.

23 On page 8 Bio-T-16, first paragraph,
24 seventh line, strike the following: within which
25 are approximately 2.18 acres of ESHA associate

1 with Monarch butterfly over-wintering habitat.

2 On page 8, Bio-T-16, second paragraph,
3 fifth line down. The sentence beginning with: As
4 indicated, it's beginning of the third sentence.
5 Strike the third sentence, the fourth sentence and
6 the fifth sentence. And replace with the
7 following: Monarch butterfly over-wintering area
8 within this region not already protected under the
9 archeological conservation easement will be placed
10 in a conservation easement.

11 Page 45, Bio-T-16, third paragraph
12 within this heading, third line down. In
13 parenthesis, strike out: within which are
14 approximately 2.18 acres of ESHA associated with
15 Monarch butterfly over-wintering habitat.

16 Page 46, second paragraph, strike out
17 the second, third and fourth sentences and replace
18 with: Monarch butterfly over-wintering areas in
19 the southeastern portion of the site not already
20 protected within the archaeologic conservation
21 easement will be protected with a conservation
22 easement.

23 And finally, page 46, paragraph with
24 recommended changes to Bio-T-16, first sentence of
25 condition after associated with Morro Creek on the

1 Morro Bay Power Plant, add: and Monarch butterfly
2 over-wintering areas not already protected with
3 the archeological conservation easement.

4 Q Does that complete your corrections to
5 both exhibits?

6 A Yes.

7 Q Dr. Huffman, in the interest of time I'm
8 not going to ask you to summarize your
9 qualifications. Those are set forth in the
10 testimony, and perhaps also in the transcript in
11 earlier portions of this proceeding.

12 With those additions, corrections and
13 clarifications are exhibits 199 and 200, are the
14 facts contained therein true to the best of your
15 knowledge?

16 A Yes.

17 Q And the opinions represent your best
18 professional judgment?

19 A Yes.

20 Q Do you adopt them as your testimony in
21 this proceeding?

22 A Yes.

23 Q Okay, Dr. Huffman, could you describe
24 how you went about analyzing the terrestrial
25 biology impacts of the Morro Bay Power Plant

1 modernization project?

2 A Yes. In a study such as this, there are
3 really two key areas which we assess or focus on
4 in terrestrial biology evaluations. And those are
5 impacts to protected species with associated
6 habitat that is necessary for the species
7 survival.

8 And secondly, protection of habitat
9 that's protected for its own sake irrespective of
10 species.

11 The way we went about looking to see if
12 the project had potential impacts on protected
13 species was to query available databases that the
14 California Department of Fish and Game maintains.
15 It's a California natural diversity database.

16 And we look for species that potentially
17 could occur within a mile of the site that were
18 listed. We also looked at the California Native
19 Plant Society listing. And we're looking for both
20 plants and animals when we refer to the California
21 natural database list.

22 We also looked for known studies of the
23 species and information that would let us know
24 whether the species were present or not.

25 From the database and other descriptions

1 we would ascertain what would be the type of
2 habitat that the species would require. And then
3 we initiated a site survey over the areas that
4 potentially would be impacted by the project.
5 Determine what habitats were there.

6 And then through a process we determined
7 what species would likely to be impacted. And
8 once we did that then we conducted focus surveys
9 following agency-established criteria for
10 methodology, or develop, where those were absent,
11 methodology that would insure that we look for the
12 species during the time that it would be most
13 present, such as breeding period.

14 Once we got that information we then
15 assessed it according to CEQA criteria, and
16 determined whether or not there would be a
17 potentially significant adverse effect on the
18 species.

19 If we did find that to be the potential,
20 then we looked at ways to mitigate that impact
21 below significant impact level.

22 Similarly for species that are what we
23 would call -- when we evaluated the species we
24 looked at it from the standpoint, also, of the
25 habitat. And in terms of CEQA we're looking at

1 occupied habitat. And we looked at the effects
2 and did the CEQA significance analysis.

3 And then if it was a potential for
4 significant adverse effect, we developed either
5 mitigation or avoided the problem. In the case of
6 mitigation, we lowered the threshold of impact
7 below significance.

8 For habitats that are protected, for
9 their own sake, what I'm referring to are what
10 we'll call as protected habitats. I'm talking
11 about habitats that are named in LORS, for
12 example, by the City or County. We're talking
13 about habitats that are described as important by
14 the California Coastal Commission, as well as by
15 the California Department of Fish and Game; and
16 U.S. Fish and Wildlife Service, and they're
17 protected under regulation, policy or ordinance.

18 Again, for these types of habitats, we
19 reviewed the different laws and regulations and
20 policies, and then went to the site where the
21 project would occur. And evaluated the site to
22 determine if these habitats were present or not.

23 And if they were present we evaluated,
24 through CEQA guidelines, whether or not there'd be
25 a significant adverse effect to these projects.

1 And if there was determined to be a potential for
2 significant adverse effect, we then focused on
3 mitigation to minimize the impact below a
4 significant threshold.

5 Q Could you briefly describe the
6 geographic areas that are potentially affected by
7 the project?

8 A Yes. I think it might help if I used an
9 audiovisual.

10 (Pause.)

11 DR. HUFFMAN: Okay, this is what we call
12 the Morro Bay Power Plant site. And the area I'm
13 talking about is -- actually a better picture
14 would be -- actually to show the site boundary is
15 when I talk about the Morro Bay Power Plant I'm
16 talking about the black boundary that's shown
17 here.

18 HEARING OFFICER FAY: Dr. Huffman, can
19 you reference the picture you're showing?

20 DR. HUFFMAN: Yes. This particular
21 picture was our figure that was taken from the
22 AFC, and it's figure 6.6B-2A.

23 The power plant, itself, as far as
24 potential impacts to habitats in just general
25 summary, the actual construction of a power block,

1 itself, involves about 19 acres.

2 In addition to that there is an area
3 which is known as the, or proposed to be the craft
4 parking area which is about four acres, which is
5 similar to the open area; it's grassland, both
6 native and non native species, as well as
7 ornamental trees planted for wind breaks and
8 visual screening on both sides of it.

9 There's also riparian area adjacent to
10 it. And that's approximately, again, four acres
11 with potential impact.

12 There's also an area where a footbridge
13 would cross a drainage which I'll talk about a
14 little later. But the footbridge was another area
15 of potential impact.

16 There's also an area that would be an
17 area where a gas pipeline would cross, a high-
18 pressure gasline which would go from the gas
19 manifold area that's located approximately here,
20 and would move gas across to the site here. And
21 there would be an underground directional bore to
22 bring that pipe across.

23 Also, a project component is the
24 temporary access route to the plant. And this is
25 the right lower, my pointer that's Morro Creek

1 alignment. Components of that temporary access
2 include Embarcadero Road south of Morro Creek.
3 That is a dirt road. It's partially paved.
4 Portions of it have been formerly paved. And it's
5 a graded dirt road which provides access to a
6 beach area here, as well as a boat yard that's
7 located in this area.

8 There's a proposed bridge crossing
9 across Morro Creek here. And then beyond that is
10 north Embarcadero which extends up to
11 approximately here where it intersects with
12 Atascadero.

13 Project impacts in this area are focused
14 on just the actual paved roadway as it is
15 currently. I'll talk more about mitigations and
16 protections for that area later.

17 In addition to that there's two other
18 areas which we talk about. And this is from the
19 final biological assessment attachment 5. And
20 this is what's known as the construction stage and
21 laydown area which is located at Camp San Luis
22 Obispo.

23 MS. SPEAKER: Change the English
24 language instead of hell-o, heck-a-no. Excuse me,
25 sir, --

1 HEARING OFFICER FAY: Excuse me, ma'am.

2 This is not your time to talk.

3 MS. SPEAKER: I just picked this up
4 outside, but I just want to suggest also --

5 HEARING OFFICER FAY: Ma'am, --

6 PRESIDING MEMBER KEESE: Ma'am,
7 ma'am, --

8 MS. SPEAKER: -- let's go with solar and
9 clean power --

10 PRESIDING MEMBER KEESE: Let's go off
11 the record.

12 (Brief recess.)

13 HEARING OFFICER FAY: Back on the
14 record.

15 DR. HUFFMAN: Okay. This is the Camp
16 San Luis Obispo construction staging and laydown
17 areas. There's actually it's somewhat spread out
18 and we refer to it as actually five separate
19 areas.

20 The laydown areas, themselves, largely
21 consist of buildings, paved areas. There's about
22 15 acres of that. And roadways. There's also 25
23 acres of grassland habitat, drainage ditches and
24 so on.

25 During my discussions I'll keep coming

1 back to this map, because there's several species
2 issues that we'll be talking about. But just for
3 reference, highway 1 is located up here. And
4 Morro Creek is located here.

5 HEARING OFFICER FAY: Excuse me, Dr.
6 Huffman, for interrupting you. Instead of saying
7 here, could you give us a directional reference,
8 north, south from the -- another reference point?
9 Because in the transcript we don't have the
10 picture before us.

11 DR. HUFFMAN: I understand. Highway 1
12 is located to the northeast of the site. And
13 staging areas C and D are located within the site;
14 they represent the easternmost area of the laydown
15 area.

16 We've also got staging area E, which is
17 in the central portion of the site. And the
18 largest is approximately 22 acres in size. And
19 staging areas A and B, the smallest, about four
20 acres, is located to the west of the site.

21 The other area I'm going to refer to is
22 known as a satellite parking area. And that's
23 this area here, which is located south of highway
24 1. And it's approximately ten acres in size. And
25 what's the proposed use of this is approximately

1 ten acres. I'm sorry, approximately three acres,
2 with the potential for the increased use to five
3 acres.

4 BY MR. ELLISON:

5 Q Dr. Huffman, does that complete your
6 description of the geographic areas?

7 A Yes.

8 Q Now, Dr. Huffman, hang with me here
9 because we're going to change the direct that we
10 discussed in order to try and move things along
11 more quickly. So I'm going to ask you a couple
12 questions; you just give me short yes-or-no
13 answers.

14 I want to talk first about species, and
15 then we'll talk about habitat you described
16 earlier, but those are separate discussions.

17 With respect to species, you did a
18 database search to identify the species that might
19 potentially be found in the area, did you not?

20 A Yes.

21 Q And that's described in your prefiled
22 testimony, correct?

23 A Yes.

24 Q Okay. And from that you identified the
25 species that you needed to survey for, correct?

1 A Yes.

2 Q And do you know, off the top of your
3 head, the number of species that you identified?

4 A For the Morro Bay Power Plant site, as
5 well as the access route along Embarcadero, we
6 identified 19 plant species and 20 animal species.

7 Q Okay. And then you conducted surveys,
8 either protocol surveys or surveys where there is
9 no protocol, based upon your best professional
10 judgment, you conducted surveys for these species
11 at the plant site, the laydown area and the
12 offsite parking area, correct?

13 A Well, for the Morro Bay Power Plant we
14 conducted surveys for those species where they
15 weren't already known to be present. For example,
16 a peregrine falcon, the snowy plover, western
17 snowy plover, we didn't do surveys because we
18 already knew they were there. But for other
19 species we focused on that.

20 For the satellite parking area, the area
21 was a plowed field, and we did not conduct
22 surveys. For the Camp San Luis Obispo site, we
23 relied on the National Guard's information, plus
24 conducted our own independent evaluation database
25 to come up with the information.

1 And then we also, there was a finding of
2 an endangered snail species, Morro Bay -- Morro
3 shoulder-band snail, and this was found at CalPoly
4 earlier this year. And we were asked to -- or we
5 looked at this issue and determined that it was
6 atypical where you'd normally find the snail. But
7 nevertheless, -- I need to get a little bit of
8 water --

9 Q While you're getting some water let me
10 just say I want to skip the questions about the
11 process that you went through to find species, and
12 just ask you what species did you find at the
13 plant site, the laydown area and the offsite
14 parking area?

15 A Okay. At the Morro Bay Power Plant site
16 we found in the riparian area the Monterey dusty
17 footed wood rat. And we also found steelhead
18 trout.

19 In the Embarcadero roadway we found a
20 food source for the Morro Bay blue butterfly, and
21 so we assumed that it's present along the
22 alignment that will be impacted.

23 At Camp San Luis Obispo we found with
24 surveys that were conducted, because of the
25 finding of the snail that was in an atypical type

1 habitat, we looked at Camp San Luis Obispo and
2 found the Morro shoulder-band snail at the Camp,
3 located around some of the perimeter areas of the
4 proposed staging and laydown areas.

5 We also found the Morro Bay shoulder-
6 band snail located around the perimeter, not in
7 the plowed areas, but in the perimeter, along the
8 perimeter of the satellite parking area.

9 Q Now, based upon the surveys could you
10 also describe what, quote, occupied habitat, as
11 you described earlier, what kind of occupied
12 habitat did you find?

13 A Obviously Morro Creek is occupied by
14 steelhead trout; occupied habitat along the dunes
15 on the southern Embarcadero route where we would
16 be impacting dune, the Morro Bay blue butterfly.
17 The occupied habitat with reference to the Morro
18 shoulder-band snail, which occurred at Camp San
19 Luis Obispo. As well as the satellite parking
20 area.

21 Q And, again, and for the purposes of your
22 testimony, we're using the phrase occupied habitat
23 to describe habitat that must be protected, not
24 for its own sake, but because under the CEQA
25 significance criteria, loss of the habitat would

1 have an impact on the species, itself?

2 A Yes. I might also mention that we found
3 occupied habitat in the riparian areas around the
4 power plant, the Monterey wood rat.

5 Q Okay. Could you briefly summarize the
6 mitigation measures that you developed and that
7 Duke adopted for the species and occupied habitat
8 that you found?

9 A Yes. These involve obviously fencing
10 off areas; providing protective fencing.
11 Conducting searches for the presence of the
12 species that might be in construction areas.
13 Monitors onsite during construction. Fencing to
14 preclude the species from access to the site.

15 Spill prevention plans; stormwater
16 prevention plans; biological mitigation
17 implementation; monitoring plans; all in place at
18 all sites to assure that avoidance of species
19 occurs. And that the impacts are minimized. It
20 was all in place.

21 In addition to that, worker training on
22 the identification of a species and alerting the
23 workers to stop work if they were, for example, to
24 see a snail. Stop work, because it may be a
25 protected species. Contact a biologist and

1 determine what to do.

2 All of these are in place. In addition
3 to that, we worked on certain avoidance mitigation
4 measures, such as Morro Creek, itself. We clear-
5 spanned that creek so there was no impact to the
6 riparian area of the Creek or the wells associated
7 with it.

8 And we tried to minimize the impact of
9 the roadway along Embarcadero by fencing, trying
10 to stay within the roadway, itself, both north and
11 south of Embarcadero.

12 In addition to that there are several
13 species that are found next to the road which we
14 developed minimization measures to -- or
15 mitigation measures to provide further protection
16 for the snowy plover, which is found west of
17 Embarcadero, north Embarcadero Road. It nests
18 within the state park. It's not found to nest
19 south of the state park the past few years.

20 Also, the globos dune beetle; was
21 associated with the fording areas west of
22 Embarcadero. And also the Morro shoulder-band
23 snail was found at the bend in the road where the
24 intersection of Embarcadero, north Embarcadero and
25 Atascadero Road. Those areas are being avoided.

1 Q Dr. Huffman, could you put the map back
2 up very quickly and just point out, we're going to
3 have quite a bit of discussion this afternoon
4 about the snail and the plover. Could you just
5 quickly with your pointer show where the snail was
6 found that you just described with respect to the
7 power plant, and the plover?

8 A The snail I was referring to along
9 Atascadero and Embarcadero was found in this area
10 here. It's also found up along this corner here.
11 And the snail has been known to be found up in
12 this area, in the Atascadero State Beach area.

13 We also found shells, but no living
14 snails in an area approximately right in here.

15 HEARING OFFICER FAY: Could you describe
16 where here is?

17 DR. HUFFMAN: Sorry. It would be just
18 south of the PG&E property.

19 BY MR. ELLISON:

20 Q And could you also describe the location
21 of the snowy plover, please?

22 A Yes. Nesting occurs within this area
23 that's the north of the power plant and northeast
24 of -- or northwest of Atascadero Road. And then
25 snowy plover also occurs, but so far has not been

1 found to nest, in areas to the west of
2 Embarcadero, and south of the intersection of
3 Atascadero and Embarcadero, along the beach area.

4 Q Just for a sense of scale, I understand
5 that it's .9 of a mile from the corner of north
6 Embarcadero and Atascadero Road, is that point
7 there to the power plant site, it's .9 of a mile,
8 is that correct?

9 A It's about .9 of a mile to the tank farm
10 area.

11 Q All right, Doctor, we do need to keep
12 this moving. Let me ask you with respect to the
13 so-called protected habitat, as you're using that
14 term in your testimony, this is habitat that's
15 protected for its own sake, not because of an
16 impact on a species.

17 Could you describe whether you
18 identified any areas of protected habitat that
19 could be impacted by the project?

20 A Yes, we did.

21 Q And would you briefly describe what they
22 are, and how you mitigated them?

23 A Protected habitat on the site, referring
24 to riparian and wetland areas, which went along
25 Willow Camp Creek, which is in approximately the

1 northeastern portion of the power plant site.

2 There's going to be a bridge across
3 there, a pedestrian bridge crossing, which would
4 link the craft parking area with the power plant.
5 And the level of impact is about two-hundredths of
6 an acre. And is associated with trimming of
7 willow branches to accommodate the placement of an
8 eight-foot-wide walkway, which is going to be
9 placed on top of an existing set of piers, which
10 are now supporting a pipeline that's going to be
11 removed.

12 Q Okay.

13 A There's also an impact related to the
14 roadway south of Embarcadero where on the western
15 side of that roadway, near Morro Creek, there's an
16 area about .33 acres which, due to the
17 construction of trails and fencing, will lose
18 approximately .33 acres of dune habitat which is
19 an ESHA under the City's LCP.

20 MR. ELLISON: Mr. Fay, let me stop here
21 for a moment. We have some additional testimony
22 related to the specific issues of dispute between
23 the staff and Duke.

24 I do understand that Ms. Tyson has a
25 time constraint. I understand that there was an

1 interest in having this kind of background that
2 we've just gone through as a predicate to her
3 comments.

4 So let me offer, entirely at your
5 pleasure, whatever you want to do. We could break
6 here, take Ms. Tyson's comments. Go to lunch and
7 then come back and complete the testimony, or we
8 could continue.

9 HEARING OFFICER FAY: My only concern is
10 whether Ms. Tyson would benefit from hearing your
11 specific comments. And I just don't know whether
12 that would be the case.

13 Ms. Holmes, do you have any idea --

14 MS. HOLMES: I suggest we ask Ms. Tyson.

15 MS. TYSON: Yes, I would benefit from --

16 MR. ELLISON: Okay.

17 HEARING OFFICER FAY: How much longer do
18 you think it will take?

19 MR. ELLISON: We'll move it as quickly
20 as we can. I think it's probably ten minutes.

21 HEARING OFFICER FAY: Sure. Let's go
22 ahead so she has the whole --

23 MR. ELLISON: That's fine. I'm not
24 trying to exclude it, I just want to give people
25 the choice.

1 HEARING OFFICER FAY: Yeah.

2 BY MR. ELLISON:

3 Q Okay, in that case, Dr. Huffman, having
4 done the analysis and adopted the mitigation
5 measures that you have just described, do you
6 believe that the project will have a significant
7 adverse impact within the meaning of CEQA?

8 A No.

9 Q And did you also examine the question of
10 whether the project would have a cumulative impact
11 within the meaning of CEQA with other projects in
12 the area?

13 A Yes, I evaluated it and I do not believe
14 that we will have cumulative impacts based on the
15 mitigation that we're proposing.

16 Q Okay. And based on this analysis and
17 those mitigation measures do you believe the Morro
18 Bay Power Plant project will comply with all
19 applicable laws, ordinances, regulations and
20 standards that relate to the terrestrial biology?

21 A Yes.

22 Q Have you had a chance to review the
23 final staff assessment?

24 A Yes.

25 Q Do you agree with staff's conclusions as

1 to significance of impacts or compliance with
2 applicable laws?

3 A No.

4 Q Could you briefly describe the
5 differences that you have with staff?

6 A Yes. Staff makes a point about
7 significant impacts, and they're assuming that
8 mitigation is required, or compensatory mitigation
9 is required.

10 Many of the impacts that we've seen are
11 mitigatable and therefore below the threshold of
12 significant. And we believe that CEQA does not
13 require compensatory mitigation for mitigation for
14 non significant impacts.

15 More specifically, if we look at the
16 tank farm area referred to earlier there's about a
17 three-acre section of iceplant within that tank
18 farm that is not an ESHA, it's not a protected
19 habitat in other words. We've done protocol level
20 surveys; have determined that there are no
21 endangered Morro shoulder-band snails present, nor
22 any other listed species for that matter. There's
23 no evidence of previous snail occupation.

24 The area is highly fragmented; it's a
25 tank farm. It undergoes maintenance, continual

1 maintenance. It's not designated within a
2 critical habitat of the snail. And therefore we
3 do not see that there's a significant impact
4 requiring compensatory mitigation.

5 Secondly, I might add that there is a
6 known snail population; it's about .9 mile away.
7 This is at the intersection of Atascadero and
8 North Embarcadero. But it would be very difficult
9 for the snail to even get to that point, through
10 the tank farm. I think our surveys have
11 demonstrated that. And so that's another reason
12 for why we don't think mitigation is appropriate.

13 There's also the existing dirt road
14 which I referred to as south of Morro Creek,
15 Embarcadero dirt road. Staff believes that
16 there's a significant impact there because it's
17 impacting dune habitat.

18 The problem with that is that it's a
19 dirt road. It's been a dirt road. It will
20 continue to be a dirt road, the City has assured
21 me of that. There are utility lines which run
22 under the dirt road. The dirt road is
23 periodically paved. There's some sections of
24 pavement on the road now.

25 There's no reason to say that it's ever

1 not going to be a road. It's not an ESHA. It's
2 not a dune. There's no species, listed species,
3 that occur on that, or it's not critical habitat
4 for sensitive species, as well.

5 So, calling it a significant impact, to
6 me, seems very unrealistic.

7 There's also a 31-acre area; it's a
8 grassland area that's near the entrance of the
9 power plant site. It's a grassland. There's no
10 listed species found in this area. It's not a
11 dune habitat. It's not an ESHA.

12 As CEQA baseline it is a grassland, it's
13 no more, no less. Yet staff feels that there's a
14 significant impact with the loss of this grassland
15 habitat. And staff, in fact, has called this
16 grassland habitat, has referred to it as a dune
17 habitat. And, in fact, it is not. It's not an
18 ESHA and it's not a dune.

19 Staff also is requiring .28 acres of
20 mitigation for a portion of iceplant that's
21 adjacent to the intersection of Atascadero and
22 North Embarcadero Road. This is an area that the
23 project is avoiding. At the edge of the road
24 there's going to be placed temporary fencing, so
25 that truck traffic does not veer off into the

1 iceplant.

2 The condition now is the public uses
3 this area and there's lots of vehicles, and people
4 don't veer off into this area, as it stands. It's
5 very steep.

6 In addition to that, we are proposing
7 permanent fencing beyond this point to provide
8 protection for the snowy plover, as well as the
9 Morro shoulder-band snail. But yet, even with
10 these protections, staff is saying that we're
11 going to have a significant impact to this
12 iceplant area and it requires compensatory
13 mitigation.

14 At Camp San Luis Obispo staff is
15 determined that basically the whole area, there's
16 going to be significant loss of snail habitat, and
17 use by red-legged frog for dispersal habitat.
18 Again, they determined that this is a significant
19 impact and they're going to require 37 acres of
20 mitigation for this.

21 First of all, the entire area, as we've
22 been able to determine so far from our analysis of
23 the snail in this location, is that only the
24 peripheral areas of the site are occupied by the
25 snail.

1 I'd like to show quickly where these
2 snails have been found. We're checking the
3 document. This is a study that was provided to us
4 by a subcontractor who specializes in Morro
5 shoulder-band snail surveys. And this is a map
6 that depicts the locations of where the snails
7 have been found so far.

8 And back to this is Camp San Luis
9 Obispo. We've done two protocol surveys in area
10 E. We've not found any snails within area E with
11 the exception around the border of area E in some
12 debris piles and clumps of anise plants. And in
13 the ditch area located here, which is within the
14 southwestern portion of area.

15 The snail was also found in rocky
16 outcroppings in a debris pile across the creek
17 which borders the southwestern portion of area E.
18 There were two findings of snails along just
19 outside, along the border of area E to the
20 northeast. And one away from the site of area E
21 completely to the northeast.

22 There were also snail findings outside
23 of area C to the south along the ditch line or
24 drainage in clumps of anise plants and coyote
25 brush, in these areas. And there was a snail

1 finding along a fenceline which separates areas C
2 and D, which is approximately in the center of C
3 and D.

4 All these snails were found associated
5 with moist clay soils, rocky outcroppings, or
6 debris which provides them with forage. No snails
7 were found in the grassland areas inside of area E
8 or C, or A and B, keeping in mind that there's
9 also most of area A and B is paved, with
10 buildings, and about half of area D is also paved,
11 with buildings.

12 Q Dr. Huffman, does that complete your
13 description of the areas in dispute with the
14 staff?

15 A I just wanted to add that we did
16 additional surveys for snails, and not only were
17 they found at CalPoly, they were found at the
18 northpoint site, which is north of the Morro Bay
19 project, some 15 miles away from Camp San Luis
20 Obispo.

21 We've also found the snail at the
22 satellite parking area around the perimeter, but
23 not within the plowed area.

24 And we found them north of highway 1,
25 approximately a mile away from the site. So they

1 are within the Chorro Valley.

2 But all of our findings are, again,
3 found in either moist clay soils, within rocky
4 outcroppings or debris deposits. My point there
5 is that any open grasslands within the Camp San
6 Luis Obispo site we don't have those conditions.
7 And so we don't expect that they're going to be
8 found there.

9 Nevertheless, we are going to continue
10 with these surveys. And I just wanted to point
11 that out.

12 As far as California red-legged frog, we
13 don't have any known sightings within the
14 construction laydown area. Our sightings are
15 associated with Chorro Creek and then the siting
16 is within about 200 yards of the site. There's no
17 known breeding or nesting/breeding ponds within at
18 least a mile of the site.

19 So, yes, the frog could disperse, but
20 red-legged frogs disperse, when they disperse they
21 disperse in any direction. They don't have a
22 preferred habitat type of dispersal.

23 So, we believe that this is not a
24 significant impact. We believe that we can avoid
25 impacts to the snails at the laydown area. We

1 also believe that we can minimize any potential
2 harm to these species through the various
3 protective measures that we've proposed.

4 And that we are continuing to work with
5 Carol Tyson of the U.S. Fish and Wildlife Service
6 to maintain protection.

7 Q Dr. Huffman, just for clarity, is it not
8 correct that the reason for these surveys having
9 begun this year rather than earlier, and the
10 reason that they are continuing is because the
11 snail is recently discovered to occupy habitat
12 which previously no one believed that it would
13 occupy. And so that triggered the need to survey
14 a whole different set of habitat than had
15 previously been thought to be necessary? Is that
16 a fair --

17 A That's correct. The typical habitat for
18 the Morro shoulder-band snail is sandy areas of
19 less than 10 percent slope, with dune-like
20 vegetation or potential for dune vegetation.

21 And this is certainly atypical of where
22 they were typically found.

23 Q And as a result of it being in a
24 different habitat of perhaps other
25 characteristics, is there some question in your

1 mind as to whether these snails are, in fact, the
2 same species as the endangered Morro shoulder-band
3 dune snail?

4 A Yeah, there is some scientific question
5 now whether or not these snails are, in fact, even
6 the same species, or maybe they're a variety. But
7 they're certainly different from the listed snail,
8 the morphological type of snail that was described
9 in the listing.

10 Nevertheless, they still fall within
11 that category and are protected under the
12 Endangered Species Act, as such, until it can be
13 determined that either they are a variety, which
14 they'd still be protected, or they're a separate
15 species. We are focusing on that.

16 Q Okay. Duke also has some other concerns
17 with respect to the staff-proposed conditions of
18 certification that have more to do with business
19 issues.

20 Whereupon,

21 MICHAEL POLLACK

22 was recalled as a witness herein, and having been
23 previously duly sworn, was examined and testified
24 further as follows:

25 DIRECT EXAMINATION

1 BY MR. ELLISON:

2 Q I'd would like Mr. Pollack to, as
3 briefly as you can, summarize --

4 MR. ELLISON: Well, let me ask this:
5 These really are kind of distinct issues from the
6 issues that I think Ms. Tyson might be concerned
7 about.

8 Again, I would offer, if you want, we
9 can stop here and Ms. Tyson can make her comments.
10 Or you can have --

11 HEARING OFFICER FAY: Maybe you ought to
12 characterize them so she could --

13 MR. ELLISON: These go to questions
14 about when certain payments might be made. They
15 go to issues about whether certain plans have to
16 be submitted at tank farm demo, or later. They're
17 kind of that sort of issue. Is that an --

18 MR. POLLACK: That's an accurate
19 representation, I believe.

20 HEARING OFFICER FAY: Okay. Ms. Tyson,
21 can you forego that? All right. Fine, why don't
22 we take a break in your presentation. We'll take
23 her comments.

24 And then after lunch you can come back
25 and address the other areas of disagreement.

1 All right, Ms. Tyson, thank you for
2 coming here. And I'd ask, are you willing to be
3 sworn as a witness to testify on behalf of the
4 Service?

5 MS. TYSON: Yes.

6 HEARING OFFICER FAY: All right, could
7 you please stand and the court reporter will swear
8 you.

9 Whereupon,

10 CAROL TYSON
11 was called as a witness herein, and after first
12 having been duly sworn, was examined and testified
13 as follows:

14 DIRECT TESTIMONY

15 MS. TYSON: Okay, my name is Carol
16 Tyson.

17 HEARING OFFICER FAY: And we'll need you
18 to speak closely into the mike so we can hear you.

19 MS. TYSON: Okay. My name is Carol
20 Tyson. Is that working? And I work for the Fish
21 and Wildlife Service. And I've taken a number of
22 notes here while Dr. Huffman was speaking. So I'm
23 going to look at my notes here so I can capture
24 everything I wanted to respond to, and everything
25 that I wanted to present.

1 Duke Energy is actually entering into a
2 formal consultation through the federal agency
3 that's providing a permit for this process. And I
4 just wanted to clarify that we've been working on
5 designing this project to minimize impacts to
6 federally listed species and their habitat.

7 And the draft biological assessment
8 incorporates quite a few measures that we've
9 agreed to to minimize adverse effects.

10 But I wanted to make a distinction
11 between the formal and informal process, and we're
12 following the formal consultation process, which
13 means that we were not able to minimize effects
14 below the level of insignificant. And therefore,
15 we did enter into a formal consultation.

16 The reason we weren't able to do that is
17 that there may be listed species that could move
18 into a certain area, or they may occur in a
19 project area, and there may need to be relocation
20 activities associated with actually trying to
21 protect the species; moving them to another area
22 so they won't be impacted by the project.

23 And through these relocation activities
24 there can be harm, or individuals can be killed.
25 So I just wanted to clarify that although we're

1 minimizing adverse effects, we can't say that in
2 all cases we're reducing them below the level of
3 significant, or down to a point of insignificance.

4 I also want to clarify that the Service
5 is concerned about unoccupied habitat, or habitat
6 that may be suitable, but is not known to be
7 occupied, that can fall adjacent to the known
8 occupied habitats.

9 So, for instance in some of the staging
10 areas at Camp San Luis Obispo, staging areas C, D
11 and E, although snails are known to occur on the
12 perimeter of those sites, and actually there are
13 snails within staging areas C, D and E, according
14 to the map that I have, we have to assume that
15 snails can occur -- that basically this is
16 occupied habitat.

17 And that in areas where we don't know
18 snails are occurring, or we've completed protocol
19 level surveys and we haven't found them, it's so
20 close to occupied sites that it's considered
21 suitable habitat.

22 So, we need to assess that in the
23 biological assessment, and we need to deal with it
24 in the biological opinion. And I just want to
25 make it clear that when we do have habitat that's

1 close to occupied habitat, even though it doesn't
2 appear at this time to be occupied, it still needs
3 to be addressed and dealt with.

4 And that also brings me to another point
5 I wanted to make about the snowy plover, which is
6 known to occur along the beach north of the
7 project area, and not necessarily known to occur
8 south. But we're assuming that historically at
9 one time it probably did occur south.

10 And likewise, the snail is known to
11 occur at North Embarcadero and Atascadero Roads.
12 Nonliving shells were found on the project site in
13 area, I believe, 8.

14 And at one point historically there was
15 probably connectivity between those sites that
16 went through the tank farm area. But, through
17 section 7, since the applicant completed protocol
18 level surveys, we are not requiring that the
19 applicant do anything for that particular site.

20 But I just want to clarify that we have
21 to assume that at one point this was probably part
22 of their historic range.

23 Habitats adjacent to known occupied
24 areas conserved for dispersal, foraging, use.
25 They can also be potentially historic use areas.

1 The California red-legged frog, we are assuming,
2 although it may not be currently used, that the
3 laydown area can function as dispersal and
4 foraging habitat.

5 And because we've assumed this, Duke is
6 incorporating measures to minimize impacts by
7 having a monitor on site and that kind of thing.
8 But I just want to clarify those points about
9 level of significance, and the fact that in many
10 cases, even though there's habitat that isn't
11 shown through surveys to be occupied at the time,
12 if it's close to occupied areas, it does serve as
13 suitable habitat, and we have to deal with that
14 through the Endangered Species Act.

15 I have several concerns about -- there
16 were some things presented today that I was not
17 aware of. I was not aware that the satellite
18 parking area actually wasn't surveyed to protocol.
19 And that I guess it was assumed, because this area
20 was plowed, that it wasn't occupied. And that may
21 be the case. But unless protocol level surveys
22 are completed for that area, we can't assume it's
23 not occupied.

24 And I guess there was a comment made
25 that snails were not found in the staging areas at

1 Camp San Luis, and I clearly see on the map that
2 they are within staging area E, C and D. So I
3 have a hard time understanding that.

4 And in order, I guess -- so in order for
5 us to fully address the Morro shoulder-band
6 snails, we need to complete protocol level surveys
7 in areas where the project may directly or
8 indirectly impact listed species.

9 Particularly in this case we need to
10 look at the Morro shoulder-band snail. And we
11 need to also address the impacts of the project on
12 the snails and their habitat. For instance, I
13 guess we still need to work in the biological
14 assessment on understanding how the use of the
15 staging areas could impact snails that could
16 occur, or their habitat that does occur within
17 those areas. And we haven't completed that
18 process.

19 And then, once we complete that
20 analysis, we need to insure that we minimize
21 impacts to the extent possible. And if we can do
22 that, if we can minimize them adequately, we can
23 use -- those sites would be appropriate for use.
24 And then if we can't, then we may want to look at
25 alternative use areas. But we aren't to that

1 point yet.

2 So we haven't completed that analysis
3 yet. We haven't developed minimization measures.
4 And I also wanted to comment that, and, you know,
5 Dr. Huffman indicated that the snail appears to be
6 a different variety of the known listed species,
7 or it could be a different species all together,
8 and we've been discussing the potential monitoring
9 research that could help determine, you know, the
10 status of the species.

11 But until such time as it's delisted or
12 classified as another species, it is definitely
13 covered as a listed species under the Endangered
14 Species Act. And that's what Dr. Huffman
15 indicated.

16 So, I would hope, and I understand that
17 the FSA does have the flexibility to deal with the
18 fact that we need to continue to analyze this, and
19 eventually adopt measures, and incorporate those
20 into the biological assessment. And/or I would
21 require those through the biological opinion.

22 The section 7 process hasn't been
23 officially initiated, but we've made a lot of
24 process in developing a biological assessment that
25 I understand Duke and the Service are in agreement

1 on, although we haven't finalized the biological
2 assessment. And I've been writing the biological
3 opinion to reflect those agreements.

4 The two outstanding concerns are, of
5 course, the analysis really of the Morro shoulder-
6 band snail. And then also the fencing required at
7 North Embarcadero and Atascadero and throughout
8 that area, related to the snail and the snowy
9 plover.

10 And we're still waiting for some kind of
11 formalized agreement between Duke and the City on
12 how that's going to be implemented. And how
13 that's going to reflect also some agreements
14 reached on May 20th in a conference call between
15 the CEC, the Coastal Commission, State Parks and
16 the Service on fencing design.

17 So, once those aspects of the biological
18 assessment are completed, then we're going to go
19 ahead and initiate consultation at that point.
20 And then I understand the FSA will adopt, like I
21 said, measures in the BA as well as the biological
22 opinion.

23 I guess the cooling system discussions
24 will come up later, but I won't be here during
25 that time. I'll just make a comment that the

1 Service does support alternatives to the current
2 cooling system approach to minimize adverse
3 effects to the prey-base for pelican and sea otter
4 and tidewater gobie. Although I'm not going to
5 require anything related to that in the biological
6 opinion. But we do support alternative
7 approaches.

8 And then finally, the Service supports
9 the agreements we reached during the public notice
10 workshop on March 21, 2002, including the
11 mitigations that were recommended, and the
12 minimization measures that were discussed for Bio-
13 14 of the FSA.

14 These measures were negotiated and input
15 was provided by a variety of agencies, including
16 State Parks, the Coastal Commission, the Service
17 and California Department of Fish and Game. And
18 we support what was agreed to during that meeting.

19 And I think that's all I have.

20 HEARING OFFICER FAY: Ms. Tyson, let me
21 ask you, can you give us any date estimates for
22 some of these products that are due, the final
23 biological assessment, the biological opinion,
24 when the consultation would be completed, and when
25 you might be sending staff the information that

1 they need to turn your requirements into
2 conditions?

3 MS. TYSON: Well, the biological opinion
4 will probably be completed within 60 days of
5 receipt of the final biological assessment and
6 initiation of their consultation.

7 And I think Duke is primarily waiting
8 for agreement with the City on the fencing design.
9 And then to finalize the analysis of the effects
10 to the snail.

11 So, it's somewhat contingent on when
12 they're able to finalize their biological
13 assessment and initiate the consultation.
14 However, I have been working with the Energy
15 Commission and providing them input. They're well
16 aware of the measures that have been agreed to, to
17 date, to minimize impacts.

18 And it's my understanding that those
19 have been incorporated into the FSA.

20 HEARING OFFICER FAY: Okay, thank you.

21 PRESIDING MEMBER KEESE: Ms. Tyson, one
22 brief question. You look at laydown areas,
23 temporary use areas, differently than you do
24 permanent areas?

25 MS. TYSON: Yeah, we do. We would look

1 at the effects of that temporary activity on the
2 species. And we would look at the time of the
3 year that the impact was going to occur; the
4 magnitude and extent of the impact.

5 If it's limited seasonally, or the
6 duration is limited, and the impact appears to be
7 fairly minimal, then that certainly would be
8 considered.

9 PRESIDING MEMBER KEESE: Would your
10 mitigation last beyond the use of the temporary
11 area?

12 MS. TYSON: Generally not unless there's
13 some kind of a permanent impact to habitat, or
14 some other kind of permanent impact from the
15 project that needs to be offset in some way.

16 PRESIDING MEMBER KEESE: Thank you.

17 HEARING OFFICER FAY: And I'm going to
18 give the other parties a brief chance to ask any
19 clarifying questions of Ms. Tyson.

20 But, I'd like to say, if any other
21 parties can give us some guidance on some of these
22 contingency events, for instance, you know, an
23 estimated date on the biological assessment;
24 estimates times that the staff would need to crank
25 in all this material, that type of thing, would

1 help the Committee.

2 Mr. Ellison, do you have any questions
3 of Ms. Tyson?

4 MR. ELLISON: I don't have any
5 questions, but I do have a couple of
6 clarifications, if I may.

7 One, I do want the record to be clear
8 that Duke agrees with and supports the continued
9 analysis and surveying for the shoulder-band
10 snail, as proposed in the FSA, and as described by
11 Ms. Tyson. There's no dispute with respect to
12 that. There's no dispute with respect to the
13 requirement that additional mitigation might be
14 required, dependent upon what we find based upon
15 that.

16 Secondly, I want to clarify this issue
17 about I asked Dr. Huffman, when Ms. Tyson said she
18 didn't understand what he had said, or didn't
19 agree with, perhaps is a better way, of what he
20 had said about the presence of the snail within
21 the staging areas and the laydown area.

22 What he was saying was that it is at the
23 periphery of those staging areas, maybe within the
24 map boundary of them, but at the periphery. And
25 not within the portion of the staging area that,

1 in fact, would be used for staging, itself.

2 So, he did not -- I can have him -- I
3 don't want to testify for him here, but I'm trying
4 to move things quickly --

5 (Laughter.)

6 MR. ELLISON: If you prefer, I can ask
7 him to qualify. But, just for the record, that's,
8 I think, the basis of the difference.

9 Lastly, let me just say with respect to
10 the agreement between the City and Duke regarding
11 fencing issues, we have very much a conceptual
12 agreement with the City on cost responsibility and
13 all those sorts of things for the fencing.

14 It has been somewhat complicated, and
15 we'll probably get into this maybe more this
16 afternoon, by the fact that Duke and the City and
17 the other agencies, at least from our perspective,
18 thought we had agreed on fencing of a certain set
19 of parameters north of the Creek. And it's in
20 that context that Duke and the City were working
21 out an agreement for who would pay for it, and it
22 would be Duke who would pay for it, and all that
23 sort of thing.

24 All of that basically is in place. The
25 agencies then met, and I understand that they are

1 now proposing fencing that is considerably more
2 extensive than what we had first thought. And
3 goes south of the Creek, and the City has some
4 concerns about that. I'm not going to speak for
5 the City on that. The City can speak for itself.

6 But, that complicates reaching an
7 agreement with the City. So that's something
8 that, at least from our perspective, has changed
9 recently with respect to this fencing issue. And
10 it directly affects this question of when we can
11 get agreement with the City, which affects the
12 question of the timing of the products that you
13 were asking about, Mr. Fay.

14 HEARING OFFICER FAY: Of the biological
15 assessment?

16 MR. ELLISON: Correct.

17 HEARING OFFICER FAY: All right.
18 Anything further? Staff, do you have any
19 questions?

20 MS. HOLMES: Just a question of
21 clarification.

22 If no more protocol level surveys can be
23 conducted this year or before your biological
24 opinion is issued, do you have a sense of how the
25 Service will treat those project areas that are

1 potentially subject to the snails being present?

2 In other words, if we reach a point
3 where we don't have the final information on the
4 snails, how will the Service treat the area where
5 they're potentially inhabited, and the potential
6 impact from the project?

7 MS. TYSON: Well, I guess I'm not clear
8 as to whether or not the consultants are going to
9 be able to complete protocol level surveys in all
10 areas where they feel they're going to have
11 impacts.

12 I was assuming they would be able to do
13 that. But, if they can't, then we'll likely
14 assume presence in areas where we have suitable
15 habitat and occupancy adjacent to those sites.
16 And then try to deal with that, based on that
17 assumption.

18 MS. HOLMES: The issues of concern,
19 presumably to the applicant as well as to staff,
20 is whether or not we assume presence in a
21 situation where there could be prohibitions on use
22 of certain areas.

23 MS. TYSON: Yeah, there could be.

24 MS. HOLMES: Thank you.

25 HEARING OFFICER FAY: Okay. Any of the

1 other parties? CAPE, do you have any questions?

2 MR. NAFICY: I have a couple of quick
3 questions.

4 I'm just going to ask that you comment
5 on a couple of issues. One of them is this issue
6 of presence or absence of snowy plovers in the
7 area south of the Creek. And I've heard now a
8 couple of mentions of well, there's not there now,
9 but they may have been there historically.

10 Could you clarify a) what the source of
11 the data is, and b) whether when you say they're
12 not there you're referring to nesting habitat, or
13 nesting use, wintering use, foraging use or what
14 you mean exactly?

15 MS. TYSON: Well, actually I made the
16 statement that north of the project area, along
17 the beach, the plovers do occur, and they are
18 nesting. And we're assuming that just south of
19 that, along the beach, they likely nest
20 historically.

21 And so, we're going to -- Duke has
22 agreed to implement some measures to protect those
23 sites, to provide opportunities for the plover to
24 reinhabit those areas.

25 Then farther south of that area, we've

1 identified areas that are possibly over-wintering
2 habitat sites. And that's based on discussions
3 with State Parks and Cal Fish and Game.

4 MR. NAFICY: Okay, but you're not aware
5 of any studies monitoring, or studies that were
6 done specifically addressing whether there are
7 known over-wintering or nesting south of the Creek
8 in the vicinity of the proposed road and all the
9 fencing?

10 MS. TYSON: Can you show me on a map
11 where you're talking about?

12 HEARING OFFICER FAY: I'd ask you to
13 just try to describe it a little more specifically
14 while they're setting up the map. If you could
15 try to tighten up your description for her.

16 MR. NAFICY: Well, there's an area,
17 okay, you see up there where the Creek, you can
18 see the Creek, and then up to the north, adjacent
19 to 3, you see where there's -- that's probably
20 where Morro Strand is where that number 2 is.

21 And then there's an area south of that.
22 Are you aware of any data or monitoring in that
23 area for snowy plovers? See where the 2 is?
24 Yeah, south of that area.

25 MS. TYSON: I'm aware of, according to

1 State Parks biologists, of nesting going on north
2 of that area along the beach. And then we were
3 assuming, not based on any hard and fast data, but
4 just based on best professional judgment, that
5 historically it has occurred or could occur south
6 along the beach right in that area.

7 MR. NAFICY: Okay, yeah, I just wanted
8 to establish that there is no actual studies of
9 presence or absence of snowy plover, you know,
10 either wintering or foraging, you know, coming
11 down south from the State Parks or anything like
12 that. And I think you just answered that.

13 I'd also, you know, we haven't either a
14 party to the discussions around the fencing, but I
15 understand that fencing presents the potential for
16 increased predation because of provision of a
17 perching site.

18 So, I'm wondering, as part of this
19 fencing scheme, whatever it's going to be, are you
20 requiring, or is there any discussion of a
21 predator management plan to address potential
22 increase in potential predation by avian
23 predators?

24 MS. TYSON: We haven't discussed that.
25 It's something that we could look at, and we could

1 talk about that and discuss ways to minimize that.
2 But it's not something that's come up in
3 discussion.

4 MR. NAFICY: Okay, so as it stands
5 today, there's no proposal for predator management
6 as part of the mitigation that's proposed by the
7 impact to plover habitat?

8 MS. TYSON: No.

9 MR. NAFICY: Okay.

10 HEARING OFFICER FAY: And does the City
11 have any questions of Ms. Tyson? Okay. All
12 right. Ms. Tyson, I want to thank you very much
13 for coming and testifying before us.

14 MS. TYSON: Thank you.

15 HEARING OFFICER FAY: And you are
16 excused. We're going to take a 45-minute lunch
17 break. And I understand that lunch is in the
18 next-door room, so if people want to take that
19 break, fine.

20 We will start promptly in 45 minutes.

21 (Whereupon, at 12:45 p.m., the hearing
22 was adjourned, to reconvene at 1:30
23 p.m., this same day.)

24 --o0o--

1 AFTERNOON SESSION

2 1:30 p.m.

3 HEARING OFFICER FAY: Okay, we are back
4 on the record. And we're going to hear some final
5 remarks from Ms. Tyson of the U.S. Fish and
6 Wildlife Service.

7 MS. TYSON: Regarding significance?

8 MR. ELLISON: Yes, we would just ask if
9 you could clarify when you said you'd found things
10 significant, what that means in the context of
11 your agency and the laws that you administer. If
12 you could just give a brief clarification.

13 MS. TYSON: Under the Endangered Species
14 Act, when we enter into a consultation we either
15 enter into a formal or informal consultation.

16 The informal consultation process
17 involves a project that has insignificant effects
18 to species. A formal consultation process
19 involves effects that are significant to listed
20 species and/or their habitat.

21 And when we talk about significance,
22 we're talking about take of listed species that
23 involves harming or harassing listed species.

24 It can also relate to there can be
25 significant effects to a species habitat. But

1 that has to be evaluated in terms of the nature of
2 the activity, the duration of the activity, that
3 type of thing.

4 MR. ELLISON: So if I could just follow
5 up. If you felt that there was a possibility, for
6 example, that a snail would need to be relocated
7 such that a take permit would be required, even if
8 it was a single individual, that would trigger a
9 significance finding and a formal consultation,
10 correct?

11 MS. TYSON: Correct. If the applicant
12 wants to relocate individual species, and in the
13 process of moving those listed species, the
14 individual could be harmed or die, they need to
15 have that covered through a formal consultation.

16 MR. ELLISON: And it was that kind of
17 possibility that led you to -- you testified that
18 you had been thinking about an informal
19 consultation, but it was that kind of potential
20 take that caused you to believe that a formal
21 consultation and a take permit would be more
22 appropriate. Is that fair?

23 MS. TYSON: Yeah. We had originally
24 thought we would go informal; and then we were
25 concerned about the potential for individuals to

1 occur in the project area, and the potential that
2 they may need to be relocated. And therefore, we
3 went formally.

4 However, I do want to clarify that you
5 can have significant adverse effects to habitat,
6 and that does need to be evaluated through the
7 biological assessment process. That may or may
8 not be the case, depending on what the analysis
9 shows.

10 MR. ELLISON: Okay, that's the issue of
11 the laydown area principally, and the further
12 studies for the snail, is that what you're most
13 concerned about with respect to the habitat issue?

14 MS. TYSON: Anywhere there's habitat the
15 level of significance of impact to that habitat
16 should be evaluated, yeah.

17 MR. ELLISON: But you've been doing
18 that, right?

19 MS. TYSON: And we've done that. We've
20 done that throughout this process. We've made
21 those determinations. And Duke has incorporated
22 measures into the project to help minimize those.

23 We haven't fully analyzed the impacts to
24 snail habitat as of yet.

25 MR. ELLISON: Okay, thank you.

1 MS. TYSON: Thank you.

2 HEARING OFFICER FAY: All right, thank
3 you very much, Ms. Tyson.

4 MS. TYSON: Thank you.

5 HEARING OFFICER FAY: Especially for
6 coming back. The Commissioner has a question.

7 PRESIDING MEMBER KEESE: No, I don't
8 have a question.

9 HEARING OFFICER FAY: Oh, you don't?
10 All right. Thank you, Ms. Tyson, you're excused.

11 MS. TYSON: Thank you.

12 PRESIDING MEMBER KEESE: Before we get
13 started, let's deal with a couple of procedural
14 things.

15 Perhaps it would be helpful to deal, do
16 it in this order: We have, in front of us, an
17 objection to consideration of Duke's habitat
18 enhancement proposal in upcoming evidentiary
19 hearings.

20 We're going to grant that to the extent,
21 without discussion, to the extent that we have a
22 filing by the applicant which indicates no
23 objection to delaying discussion of the habitat
24 enhancement proposal until staff and other parties
25 have more time to analyze that proposal.

1 So, we're not going to go as far as is
2 suggested, that we stop all testimony on the
3 related entrainment, et cetera, issues. We're
4 just not going to consider in this set of hearings
5 the habitat enhancement proposal.

6 It may be appropriate, as we come to the
7 end of this, to have a brief discussion of the
8 nature of it, but we're not going to get involved
9 in any testimony on that proposal.

10 I guess that's the Committee's ruling.
11 If anybody has any comment, now is the time.

12 HEARING OFFICER FAY: Mr. Naficy.

13 MR. NAFICY: Yeah, I wanted to get,
14 maybe, a couple of points of clarification. One
15 is that the discussion that is being deferred here
16 is not just about habitat enhancement, I would
17 imagine, and it also includes discussion about
18 recent submittals and discussion of gunderboom, is
19 that correct?

20 PRESIDING MEMBER KEESE: I would say
21 that that is -- we're going to discuss the facts,
22 the scientific facts of entrainment. And that
23 would involve the current system. So I would --
24 let me ask --

25 HEARING OFFICER FAY: Yeah, basically

1 what we are doing is largely granting your request
2 in that we will not conduct evidentiary hearing
3 with cross-examination, et cetera, on Duke's
4 habitat enhancement plan/ --

5 PRESIDING MEMBER KEESE: Either the old
6 or the new.

7 HEARING OFFICER FAY: Yeah, with the
8 aquatic filter barrier. However, if time allows,
9 at the Committee's discretion, they may ask Duke
10 for a status report on their efforts on that. And
11 just leave it at that.

12 And we're going to have to figure out a
13 schedule for -- and I've asked the parties to
14 discuss this and come to me with a
15 recommendation -- a schedule for when staff could
16 complete an analysis of the habitat enhancement
17 program.

18 MR. NAFICY: I would also ask that in
19 the scheduling discussion, and I would imagine
20 that eventually it will lead to a Committee order,
21 that there will be sufficient time for discovery
22 to try to flesh out some of the details that may
23 not be worked out.

24 Okay, so I appreciate the Committee's
25 granting our request. I would like to talk

1 briefly to a separate issue, which is the issue of
2 Friday no longer being available. I'm not sure
3 how the hearings --

4 HEARING OFFICER FAY: The issue of what?

5 MR. NAFICY: That Friday not being
6 available for --

7 PRESIDING MEMBER KEESE: Okay, well, let
8 me go to point two, then. And then -- it's our
9 plan today to be out of here around 6:00. We have
10 this room till 6:00.

11 As I said, we will not be able to be
12 here Friday. Perhaps the fact that we're not
13 going to discuss the habitat enhancement proposal
14 will shorten the amount of time that we need.

15 We are checking to see how late we can
16 be here tomorrow night. And we're asking for this
17 room to be available during the evening. And we
18 are checking to see how late we can be here
19 Thursday night.

20 So it is our intention to attempt to
21 finish all these issues as expeditiously as we
22 can. The faster we move, the more we won't have
23 to stay here late at night. But that's our plan.

24 MR. NAFICY: Yeah, actually I'm glad you
25 clarified, because that's actually sort of goes to

1 what I'm going to have as a continuing objection.

2 To the extent that because of this
3 change in schedule the available time for
4 testimony will be truncated, we have a running
5 objection to that.

6 And also, we have experts flying in from
7 England. And, you know, I understand that the
8 Committee may want to expand the time, but we
9 actually had planned on working on testimony in
10 the day's events during the time that the
11 Committee now proposes to conduct hearings.

12 So, it may be fixing one problem, but
13 it's creating another, as far as I'm concerned.
14 Because that was time that was already slated for
15 me to be speaking with an expert, who, like I
16 said, is coming from England.

17 So, I want to register my running
18 objection to both, you know, truncating and
19 limiting time for testimony, and also --

20 PRESIDING MEMBER KEESE: We're not going
21 to short-circuit the submission of testimony or
22 oral testimony here. If we don't get done with it
23 by Thursday, we'll do it when we come back the
24 next time.

25 MR. NAFICY: Very well, thank you.

1 PRESIDING MEMBER KEESE: We're just
2 going to move as expeditiously -- we did the
3 alternatives reasonably expeditiously this
4 morning. We're going a little slower on
5 terrestrial. To the extent we can just keep a
6 pace, but get all the evidence on the record,
7 that's our goal.

8 HEARING OFFICER FAY: All right, now
9 we --

10 MR. ELLISON: Chairman Keese, before
11 we -- I'm sorry, Mr. Fay, but I do have a couple
12 of thoughts on these issues, if now is the right
13 time.

14 HEARING OFFICER FAY: Okay, all right,
15 go ahead.

16 MR. ELLISON: First, with respect to the
17 granting of CAPE's motion. As you've seen from
18 our written response, we do not object, although
19 we certainly have difference of opinion about how
20 we got here, we do not object to continuing the
21 proceeding on those particular issues.

22 But I want to be clear about our
23 understanding of what those issues are. The
24 habitat enhancement program linked to the
25 gunderboom. But all the other issues of

1 entrainment, the impact of once-through cooling,
2 all those things are still going to proceed as
3 scheduled.

4 PRESIDING MEMBER KEESE: Correct.

5 MR. ELLISON: Second of all, I want to
6 be clear that our not raising an objection to this
7 was explicitly predicated upon our being able to
8 work out with CAPE and staff and other parties an
9 expeditious schedule that has a minimal impact on
10 the overall schedule of this proceeding.

11 If it turns out that we cannot do that,
12 I just want to be clear that we will be coming
13 back to you and moving for some sort of
14 expeditious schedule through you. That we think
15 it's appropriate to have a reasonable period of
16 time for staff to look at these issues, for CAPE
17 to continue to look at these issues, the Regional
18 Board and all of that.

19 But, in our mind, this is not an
20 extensive discovery period. It's not lots of
21 workshops. It's not anything like that. It's
22 something much shorter than that. I want to be
23 very explicit about that.

24 PRESIDING MEMBER KEESE: The Committee
25 decided, we could have had a debate and

1 presentation on this filing. We decided to forego
2 that. The Committee does still want to proceed
3 expeditiously with this, both the hearings and the
4 subsequent set of hearings.

5 MR. ELLISON: Okay, thank you. That's
6 all I need to say.

7 HEARING OFFICER FAY: Okay, then we're
8 still dealing with the applicant's presentation of
9 terrestrial biology. I believe Mr. Ellison had a
10 few follow-up things he wanted to do.

11 Having heard from Ms. Tyson, we're
12 returning to the applicant.

13 MR. ELLISON: Okay, thank you, Mr. Fay.

14 DIRECT EXAMINATION - Resumed

15 BY MR. ELLISON:

16 Q Dr. Huffman, you'd just finished
17 describing Duke's position with respect to certain
18 disputed issues with the staff. Let me ask you
19 now, have you reviewed the conditions of
20 certification proposed by staff in the final staff
21 assessment?

22 DR. HUFFMAN: Yes, I've reviewed them.

23 MR. ELLISON: And I understand that Duke
24 has some differences of opinion with staff about
25 certain of those conditions of certification, some

1 of which you will address and some of which Mr.
2 Pollack will address.

3 Would you address those that you are
4 going to address, and then I will ask Mr. Pollack
5 to address the remainder.

6 DR. HUFFMAN: Yes. There's several
7 issues here. We have problems with Bio-T-7. We'd
8 like language added to that that clarifies that we
9 would get an incidental take permit from CDFG or
10 their concurrence --

11 PRESIDING MEMBER KEESE: Could you give
12 us a reference to where --

13 HEARING OFFICER FAY: What page is that
14 condition on, staff's in the FSA?

15 MR. ELLISON: 27.

16 PRESIDING MEMBER KEESE: Okay.

17 DR. HUFFMAN: We'd like to add the words
18 at the beginning of that condition: If
19 appropriate. And this is because we do not
20 believe we're going to be impacting any listed
21 species that are listed by the California
22 Department of Fish and Game.

23 Bio-T-14, 8A, and that's -- which page
24 is it? 3-55 of the FSA. And this requires Duke
25 to pay \$254,675 for the loss of 4.5 acres of dune

1 habitat. And, again, we feel that this is in
2 excess of the actual significant impacts.

3 And I've already addressed those, but
4 just to summarize that, we believe that there's
5 only .33 acres of dune habitat that's actually
6 lost by the project. And this is related to the
7 roadway, South Embarcadero roadway aspect of the
8 project. And the dune habitat will be impacted by
9 a widening of that roadway.

10 We do, however, object to the roadway,
11 itself, .77 acres, being considered dune habitat;
12 as well as the .3 acres of grassland habitat being
13 considered dune habitat that would be at the plant
14 entrance.

15 As well as the three acres of iceplant
16 that are found within the tank farm area. Again,
17 we do not believe there's a significant impact
18 there. Or the .28 acres at the intersection
19 between North Embarcadero Road and Atascadero.
20 There's a dune area that's occupied by iceplant,
21 but the project is not going to directly impact
22 that. In fact, we're providing protective
23 measures to prevent traffic from going into those
24 areas.

25 So, we believe that this condition

1 should be changed for those reasons.

2 PRESIDING MEMBER KEESE: All of those
3 link up to the 4.5? Those are the components of
4 the 4.5?

5 DR. HUFFMAN: Yes.

6 PRESIDING MEMBER KEESE: And what was
7 the number you think 4.5 should be?

8 DR. HUFFMAN: It should be .33.

9 My next concern relates to Bio-T-14 8C
10 which is located in the FSA on page 3-55. And
11 staff is asking for \$225,000 for a temporary loss
12 of 37.5 acres of upland habitat at the Camp San
13 Luis Obispo staging and laydown area.

14 Again, I won't belabor that, but we
15 believe that the impacts are far less than that,
16 and that needs to be reassessed and lowered. And
17 we're conducting studies related to the --
18 protocol surveys related to the Morro shoulder-
19 band snail to determine what that is. And I think
20 there needs to be flexibility to allow this number
21 to be reduced.

22 I also want to add that the impacts that
23 are being determined significant are actually
24 temporary impacts; and that the entire
25 construction laydown area that's going to be used

1 is going to be restored once the project is over.

2 And I had talked about the findings of
3 Morro shoulder-band snail being around the edges
4 of area E, or just inside area E. A large
5 majority of that is not shoulder-band snail
6 habitat at this point. We will continue to do
7 these studies, but they seem to be restricted to
8 certain micro habitats within these areas. And
9 part of our effort is going to be avoid impacts to
10 these areas where the snails are found.

11 Similarly, for areas A and B, there are
12 no snail findings. And for areas C and D, we're
13 talking about a fenceline that can be avoided. As
14 well as some snail findings that are on the
15 perimeter of area C and D.

16 And since these impacts are temporary
17 and we're avoiding impacts directly to the snail,
18 we feel that this condition is unreasonable.

19 With respect to -- I'll let Michael then
20 complete the rest of these.

21 MR. ELLISON: Actually, Michael, before
22 you do that, let me ask a clarifying procedural
23 question to the Committee based on part of the
24 ruling that we had a moment ago.

25 We have a witness who would travel here

1 to address gunderboom issues. And I've been asked
2 the question as to whether we still need him. His
3 testimony is part of the alternative cooling
4 testimony that Duke has provided.

5 And I just want to be clear that based
6 upon the ruling that you just made, we understand
7 that all of the gunderboom AFB issues are
8 deferred. And I'm going to tell this witness not
9 to come. Is that --

10 HEARING OFFICER FAY: And that's up to
11 you. But, at most, we would be receiving a status
12 report. And it might be from you, or from the
13 project manager, on where you are in developing
14 the habitat enhancement program.

15 But I don't think it's essential to have
16 a technical witness on the gunderboom and just how
17 it works in detail at this time.

18 MR. ELLISON: Okay. Sorry for the
19 interruption.

20 Mr. Pollack, could you address those
21 issues with respect to the staff's proposed
22 conditions of certification for which you are
23 responsible?

24 MR. POLLACK: Yes, I'd be happy to. The
25 first concern, or the first conditions that we

1 have a concern on are identified on page 3-51 of
2 the FSA. The specific condition number are BIO-T-
3 8, T-9, and T-11.

4 The way the conditions are currently
5 written, it requires that these permits be
6 obtained at least 30 days prior to the start of
7 any site-related mobilization activity.

8 The staff seems to be concerned about
9 our ability to get these permits in a timely
10 manner. First of which, I wanted to point out
11 that we understand that concern, and are willing
12 to accept the risk of getting that permit in a
13 timely manner.

14 Our specific concerns relative to these
15 three conditions are that we would like to modify
16 this condition to read 30 days prior to the start
17 of any activity requiring such authorization.

18 And the concern that we have is that the
19 way this condition is written is not consistent
20 with other conditions which have already
21 previously been reviewed in this process wherein
22 those conditions were written such that the
23 document, whether it be the agreement, the plan,
24 the permit, not be submitted until 30, and in some
25 cases, 60 days prior to the event requiring such

1 permit.

2 Secondly, the effect of leaving this
3 condition as written would delay tank farm
4 demolition. It is Duke Energy's intent to move
5 forward with tank farm demolition immediately
6 following the receipt of CEC permit.

7 We already have a contractor mobilized
8 onsite, and he is doing preliminary activities
9 relative to cleaning up the tanks, and asbestos
10 abatement as part of our maintenance activities on
11 site that go on on a normal basis, so that we will
12 be prepared to move forward with tank farm
13 demolition upon receipt of permit.

14 Leaving this as written would delay the
15 receipt of that permit.

16 Secondly, we do not believe any of these
17 three agreements, or permits that are reflected
18 here are in any way associated with tank farm
19 demolition. They are associated with other events
20 which will not take place until significantly
21 later in the project.

22 In fact, if we were to move forward and
23 get these permits as prescribed here at the start
24 of such that we have them all at the start of any
25 site-related activity, the effect would be that

1 all of these three, not necessarily all, but at
2 least some of these permits and agreements would
3 actually expire before we actually got to the
4 specific activity in question.

5 That's my comments relative to T-8, T-9
6 and T-11.

7 The next condition that I wanted to
8 address was Bio-T-13, specifically item 8. Item 8
9 requires the construction of a soundwall. And the
10 way the condition was initially written was to
11 require that that soundwall be constructed prior
12 to construction or during the start of
13 construction and operation of the Morro Bay Power
14 Plant.

15 We had asked that this condition be
16 clarified in two ways. The first of which is was
17 to clarify that the soundwall being referred to
18 here was the soundwall that has, in fact, been
19 proposed by Duke as part of the project.

20 CEC Staff, in their rebuttal testimony,
21 has concurred with that specific change. What
22 they haven't modified is the requirement that this
23 be erected during or at the start of construction.

24 We have several concerns with that, the
25 first of which is that none of our sound analyses

1 are noise assumed that this wall would be in place
2 at the start of the construction period.

3 Secondly, we are not necessarily in
4 agreement that there's a significant impact during
5 this limited construction period.

6 And last, but not least, we have agreed
7 to pay mitigation payments resulting from noise
8 during construction, which, in essence,
9 compensates for this particular impact.

10 Requiring this at the start of the
11 construction period would have the effect of
12 double penalizing the project.

13 The next comment I have is on Bio-T-15,
14 and that appears on page 3-53. This has to do
15 with mitigation of impacts to the snowy plover.
16 First of all, we want to point out that Duke does
17 not necessarily agree that there is an impact
18 to --

19 PRESIDING MEMBER KEESE: What number was
20 that?

21 MR. POLLACK: Bio-T-15, mitigation for
22 impacts to snowy plover. Did we give them the
23 wrong page?

24 PRESIDING MEMBER KEESE: It's 3-56.

25 MR. POLLACK: 3-56.

1 HEARING OFFICER FAY: In the FSA --

2 MR. POLLACK: Specifically we do not
3 agree that there is an impact to snowy plover
4 nesting. As we heard earlier in testimony this
5 morning, there has been no conclusive evidence,
6 one way or the other, that the area south of
7 Atascadero Road has ever been a nesting area for
8 the snowy plover.

9 I can't confirm that it's never ever
10 been, but on the other hand, we can't confirm that
11 it is or has been recently.

12 However, in the spirit of cooperation we
13 did agree to the mitigation payments that have
14 been specified in this particular condition. All
15 we ask is that these mitigation payments and this
16 specific program be terminated after five years if
17 snowy plover nesting is not established in the
18 area north of Morro Creek and south of Atascadero
19 Road where the program's been proposed.

20 It does not seem to make sense to us to
21 continue to sponsor a \$10,000 per year, or up to a
22 \$10,000 per year nesting program when you cannot
23 establish nesting in that area after a five-year
24 period, which seems very reasonable to us.

25 Last comment is on Bio-T-16, and that is

1 on 3-56. I think we are in agreement with staff
2 on all issues here with one exception, and that is
3 in regard to a portion of a piece of property
4 which we call the Den Dulk property.

5 That piece of property was proposed to
6 go into the conservation easement because it was
7 being used as part of our dune restoration program
8 that we had proposed as part of the project.

9 This dune restoration program was
10 intended to mitigate the .33 acres of dune habitat
11 that we were affecting with the installation of
12 the road Mr. Terry Huffman previously referred to.

13 However, staff rejected that approach
14 and has, in lieu of that, moved forward in favor
15 of a monetary compensation. We have agreed to
16 accept that approach in the spirit of cooperation;
17 we will agree to that.

18 However, there is no longer a need to
19 put this portion of the Den Dulk property into a
20 conservation easement.

21 That concludes my comments.

22 MR. ELLISON: And just for the sake of
23 clarification, Mr. --

24 PRESIDING MEMBER KEESE: Yeah, let's
25 clarify what we're talking about there. Are we

1 saying you're dropping -- you think the whole 27.1
2 acres should be out?

3 MR. POLLACK: I think it's 4.44 acres.

4 PRESIDING MEMBER KEESE: The number 27.1
5 should become 4. --

6 MR. POLLACK: No, I think what we're
7 saying is that the 27.1 would be reduced to 10.1;
8 and I think we are in agreement with staff on part
9 of that reduction. It has to do with an area on
10 the south side of the property, which is 12.53
11 acres, which is actually part of an archeology
12 resource area.

13 PRESIDING MEMBER KEESE: Okay, so it's
14 4.44 you're disagreeing on?

15 MR. POLLACK: That is the 4.4 that we
16 are in disagreement on. And, again, our reasoning
17 is that the dune restoration program which was
18 slated to go in there is no longer required
19 because staff has elected to go with a monetary
20 mitigation.

21 PRESIDING MEMBER KEESE: Thank you.

22 MR. ELLISON: And just to be clear, Mr.
23 Pollack, when you said Duke has agreed to go with
24 the monetary mitigation approach, Duke has agreed
25 to provide monetary mitigation for the .33 acres

1 that Duke agrees it is impacting.

2 That there is dispute, as described by
3 Dr. Huffman, as to the remainder of the monetary
4 mitigation?

5 MR. POLLACK: That is correct.

6 MR. ELLISON: Okay. Does that complete
7 your testimony?

8 MR. POLLACK: Yes, it does.

9 MR. ELLISON: Okay. With that, I would
10 move the admission of exhibits 199 and 200, and
11 Mr. Okurowski can address the exhibits that are
12 incorporated therein.

13 MR. OKUROWSKI: I have distributed an
14 evidence list for terrestrial biology that is
15 taken from the direct testimony. And, Mr. Fay,
16 what I'd like to propose is just to go through
17 there and then have you assign a number. We can
18 all follow that as we go down, just insert those
19 numbers on the spreadsheet.

20 HEARING OFFICER FAY: You want to do
21 them all now?

22 MR. OKUROWSKI: Would you like to do
23 them now, or would you like to do them later? I
24 mean, it's up to you.

25 HEARING OFFICER FAY: I'd like you to

1 specifically identify the exhibits that Mr.
2 Ellison just moved. Give the title to those.

3 MR. OKUROWSKI: Those exhibits are not
4 on this list. The testimony, itself, is not on
5 the evidence list.

6 HEARING OFFICER FAY: I'd like someone
7 from Duke to identify exhibits 199 and --

8 MR. ELLISON: I'm sorry, Mr. Fay, for
9 interrupting. Exhibit 199 is the applicant's
10 errata to its direct testimony on terrestrial
11 biological resources. Exhibit 200 is the
12 applicant's rebuttal testimony on terrestrial
13 biological resources.

14 HEARING OFFICER FAY: Thank you. And
15 now you're asking for identification of all the
16 exhibits that Duke is providing.

17 MR. ELLISON: Yes.

18 MR. OKUROWSKI: When we prepared the
19 evidence list we discussed that we would leave
20 them blank until we arrived here today, and then
21 we would identify them.

22 Should I just move through the list,
23 sir?

24 HEARING OFFICER FAY: Sure.

25 MR. OKUROWSKI: Or would you like to do

1 it at the end of --

2 HEARING OFFICER FAY: No. Has everybody
3 got a copy of this in front of them? It says,
4 evidence, and it was included in Duke's
5 terrestrial biology testimony. And it begins with
6 exhibit 4, but then the exhibits thereafter are,
7 for the most part, left blank because they do not
8 have exhibit numbers. And so --

9 MR. OKUROWSKI: Yes, and we do have some
10 slight corrections to some of these, which we'll
11 just go through right as we go down, if that's
12 okay with you, Mr. Ellison?

13 The first one is exhibit 4, as
14 indicated. The next one says exhibit blank, which
15 should be exhibit 38. And all of the numbers, by
16 the way, correspond, if I've given a number here,
17 they'll correspond to the exhibit list, the 21
18 page exhibit list that Mr. Fay distributed through
19 the filing on May 6th. So there's a tentative
20 exhibit list that came out that day. Just so
21 we're clear on that.

22 So, it's exhibit 38. The next one, Mr.
23 Fay, is blank and needs to be identified.

24 HEARING OFFICER FAY: Well, if you
25 would --

1 (Parties speaking simultaneously.)

2 MR. OKUROWSKI: Yes, it's addendum to
3 the March 29th letter report from Brian Walton, et
4 cetera.

5 HEARING OFFICER FAY: That is exhibit
6 201.

7 MR. OKUROWSKI: The next exhibit should
8 be listed as exhibit 110, and it starts as Duke
9 Energy's project description modifications related
10 to, et cetera.

11 The next exhibit needs to be identified
12 that starts with responses of California Energy
13 Commission November 6, 2001 data request.

14 HEARING OFFICER FAY: Exhibit 202.

15 MR. OKUROWSKI: The next exhibit should
16 be listed as number 59, information-construction
17 staging areas at.

18 The next exhibit, number 133, we move
19 in, has already been identified. It is also the
20 same as exhibit 75. Those two were duplicates.

21 The next exhibit needs to be identified,
22 final biological assessment for submission, et
23 cetera.

24 HEARING OFFICER FAY: That is exhibit
25 203.

1 MR. OKUROWSKI: The next two need to be
2 identified, as well, to finish out the page.
3 Letter to Ms. Diane Noda, and letter and
4 attachments to Mr. Mark Sims.

5 HEARING OFFICER FAY: The letter to
6 Diane Noda is exhibit 204; and the letter and
7 attachments to Mr. Mark Sims is 205.

8 MR. OKUROWSKI: And that concludes the
9 first page. Moving to the second page, the next
10 two exhibits need to be identified. The first one
11 is the stream protection plan associated with
12 Morro Bay Power Plant.

13 HEARING OFFICER FAY: That's 206.

14 MR. OKUROWSKI: The next one is the
15 coastal dune restoration plan.

16 HEARING OFFICER FAY: 207.

17 MR. OKUROWSKI: And then continuing on,
18 the next exhibit, draft stormwater pollution
19 prevention plan should be identified as exhibit
20 number 170.

21 The next one, draft stormwater pollution
22 prevention plan for construction and staging areas
23 should be identified as exhibit 152.

24 And the next one, the draft stormwater
25 pollution prevention plan for the satellite

1 parking should be identified as 153.

2 And then, Mr. Fay, the entire rest of
3 this page needs to be identified. We'll start
4 with letter to Mr. Richard Anderson from Dr. Terry
5 Huffman.

6 HEARING OFFICER FAY: Exhibit 208.

7 MR. OKUROWSKI: Wildlife surveys for
8 burrowing owl.

9 HEARING OFFICER FAY: 209.

10 MR. OKUROWSKI: Addendum to wildlife
11 surveys.

12 HEARING OFFICER FAY: 210.

13 MR. OKUROWSKI: I want to make an
14 important correction here. The third line says
15 January to August 2001. This needs to say January
16 to January 2002.

17 HEARING OFFICER FAY: Does it appear
18 that way on the document?

19 MR. OKUROWSKI: It does not -- I'm
20 sorry, on the document it does appear that way,
21 yes. I'm sorry, I misspoke.

22 HEARING OFFICER FAY: On the source
23 document?

24 MR. OKUROWSKI: On the source document,
25 yes.

1 The next one is exhibit, needs to be
2 identified, Morro shoulder-banded snail, and the
3 date is April 8, 2002.

4 HEARING OFFICER FAY: That's exhibit
5 211.

6 MR. OKUROWSKI: The next is Morro
7 should-banded snail study, and the date at the
8 bottom is June 2000.

9 HEARING OFFICER FAY: Exhibit 212.

10 MR. OKUROWSKI: Turning the page, Mr.
11 Fay, this entire page needs to be identified.
12 Should I continue to keep reading, or should we
13 just do it the same way?

14 HEARING OFFICER FAY: Yes, let's --

15 MR. OKUROWSKI: Okay, habitat and
16 distribution of Morro shoulder-banded snail, dated
17 May 2000.

18 HEARING OFFICER FAY: 213.

19 MR. OKUROWSKI: Monarch butterfly, dated
20 January 2002.

21 HEARING OFFICER FAY: 214.

22 MR. OKUROWSKI: Rare plant survey, dated
23 August 30, 01.

24 HEARING OFFICER FAY: 215.

25 MR. OKUROWSKI: Report on status of

1 surveys, dated November 27, 2001.

2 HEARING OFFICER FAY: 216.

3 MR. OKUROWSKI: California red-legged
4 frog, dated August 23, 2000.

5 HEARING OFFICER FAY: 217.

6 MR. OKUROWSKI: Camp San Luis Obispo
7 training site, San Luis Obispo County, et cetera.

8 HEARING OFFICER FAY: 218.

9 MR. OKUROWSKI: Aerial photograph of
10 Camp San Luis Obispo.

11 HEARING OFFICER FAY: 219.

12 MR. OKUROWSKI: Email message from Jeff
13 Pratt of ARB, Inc.

14 HEARING OFFICER FAY: 220.

15 MR. OKUROWSKI: Updated Morro shoulder-
16 banded snail survey, dated April 29, 2002.

17 HEARING OFFICER FAY: 221.

18 MR. OKUROWSKI: I'd just like to pause
19 and clarify for a second here that that is the
20 attachment that Dr. Huffman used when he put it up
21 to show the locations of some of the studies.
22 That was one that was used.

23 The next one is letter to Ms. Carol
24 Tyson, U.S. Fish and Wildlife Service.

25 HEARING OFFICER FAY: 222.

1 MR. OKUROWSKI: Letter to Mr. Rodney
2 McInnis.

3 HEARING OFFICER FAY: 223.

4 MR. OKUROWSKI: J. Lilien personal
5 communication.

6 HEARING OFFICER FAY: 224.

7 MR. OKUROWSKI: And the last one on the
8 next page is another personal communication to Dr.
9 Anthony Orme.

10 HEARING OFFICER FAY: 225.

11 MR. OKUROWSKI: That is the extent of
12 all of the evidence for terrestrial biology.

13 HEARING OFFICER FAY: And just to
14 clarify, where you inserted a number, the exhibit
15 already appeared with that number on the
16 Committee's tentative exhibit list, is that
17 correct?

18 MR. OKUROWSKI: That is correct. You
19 distributed on May 6th a document which I believe
20 we put in the back of the room, as well, a
21 tentative exhibit list for the Morro Bay Power
22 Plant project.

23 HEARING OFFICER FAY: Okay. I've asked
24 Mr. Okurowski to, within a few days of our last
25 hearing on Thursday, to send out to all the

1 parties a draft revised exhibit list, with a
2 request that any comments on that exhibit list be
3 sent to me. I hope you'll just send that by
4 email. That would be the easiest way.

5 And hopefully we can get an official
6 revised tentative exhibit list out to all the
7 parties before they have to do their briefs.

8 Okay, anything further, Mr. Ellison?

9 MR. ELLISON: None other than a motion
10 to admit the two exhibits and the incorporated
11 references.

12 HEARING OFFICER FAY: All right, is
13 there objection? I hear none, they are admitted
14 at this point.

15 All right, thank you. I assume your
16 panel is available for cross-examination.

17 Ms. Holmes.

18 MS. HOLMES: I just have a couple of
19 questions to Dr. Huffman.

20 CROSS-EXAMINATION

21 BY MS. HOLMES:

22 Q I wanted to explore a little bit more
23 about the concept of unoccupied habitat, if I
24 could. If I understood your testimony correctly
25 you're saying that for, there's only an impact to

1 endangered species if the project has an actual
2 impact either in the designated habitat or in an
3 area where an individual is actually located? Is
4 that a correct understanding?

5 DR. HUFFMAN: What I was trying to say
6 is that it's either a direct impact to the
7 species, or with the associated habitat that it's
8 occupied in.

9 It could include some periphery areas,
10 but if the species potentially could be in the
11 habitat, but is not found there, then it's not to
12 be an occupied or significant habitat.

13 MS. HOLMES: So it's only an impact if
14 the species is actually located on the area you're
15 talking about?

16 DR. HUFFMAN: Well, no. If it's habitat
17 that's essential for the species survival --

18 MS. HOLMES: Putting aside the essential
19 habitat --

20 DR. HUFFMAN: Okay.

21 MS. HOLMES: -- that gets officially
22 designated through a regulatory process.

23 DR. HUFFMAN: Okay.

24 MS. HOLMES: So, was my understanding
25 correct?

1 DR. HUFFMAN: Yes.

2 MS. HOLMES: And when you do find a
3 species, how big an area do you assume is the
4 habitat that it's located on? Is it in the exact
5 spot where you find it? Is there some area, you
6 know, some number of inches, some number of feet,
7 some number of meters, some number of miles? How
8 do you determine where it's located?

9 DR. HUFFMAN: Well, it's related to the
10 type of habitat or micro habitat in an area that
11 the species utilizes.

12 For example, the snail in dune habitat
13 it's found in, you know, sand dunes usually less
14 than 10 percent slope with vegetative cover. In
15 areas, for example, Chorro Valley, what we've
16 learned from the data that we've gathered so far
17 is it's in moist clay soils and in drainages,
18 moist rocky outcroppings, debris piles, plants
19 that have a scrubby or bushy base to them that
20 provides moisture for the species.

21 But we're focusing on it in a micro
22 habitat, per se. There's concepts like grasslands
23 or dunes and so forth, that these species would
24 not be found in, but we're looking at what's
25 critical for the survival in a micro habitat

1 sense.

2 MS. HOLMES: I guess I'm trying to
3 understand the concept of occupied versus
4 unoccupied. If there's a snail in a given area,
5 how far out do you go before you say that's
6 unoccupied?

7 DR. HUFFMAN: Well, you sample and look
8 for the species, and you look for its habitat
9 preference. And if there's areas that are within
10 that habitat preference that you'd learn from the
11 sampling, then that would all be considered
12 occupied habitat.

13 MS. HOLMES: So if you find a species in
14 an area and adjacent to that area is habitat
15 that's unoccupied, does it stay unoccupied all the
16 time once you found an individual is adjacent?

17 DR. HUFFMAN: No, you have to account
18 for the fact that the species may, you know,
19 disperse to that area, or move through that area,
20 depending on what it does.

21 For example, a frog, for example a red-
22 legged frog might move from one aquatic location
23 to another through let's say a grassland habitat
24 or an upland habitat, cross a road. So you have
25 to take all that into account when you determine

1 what's occupied habitat.

2 But we're really talking about habitat
3 that's critical for its survival, and other
4 habitats where you've done sampling and you've not
5 found a species that's not occupied, it's not
6 significant.

7 MS. HOLMES: And did you do that, did
8 you go through that process for the Morro
9 shoulder-band snail?

10 DR. HUFFMAN: We did at the -- within
11 the Morro Bay Power Plant. We did protocol
12 surveys for that species within the tank farm
13 area. Within areas south of the PG&E yard onsite.

14 We did it along the area that's the
15 South Embarcadero temporary access route. And we
16 sampled all those areas.

17 We have done non protocol surveys within
18 the craft parking area, and along the route that
19 would be used for pedestrian access and pedestrian
20 access bridge, and the boring for the high-
21 pressure gasline.

22 The snail was found north of Morro
23 Creek, along the area of the bend in the road
24 where Atascadero and North Embarcadero meet. And
25 so we don't really need to do any more protocol

1 sampling in that locale.

2 We also did, since the finding at Camp
3 San Luis Obispo, we did protocol sampling one time
4 in area C and D. We were able to do protocol
5 sampling twice in area E. And we've done a couple
6 of other samplings, they're non protocol, within
7 area E subsequent to that.

8 We also did non protocol sampling around
9 the satellite parking area in looking for, you
10 know, does the snail occur other than Camp San
11 Luis Obispo.

12 MS. HOLMES: And did you make a
13 determination at any point that although snails
14 had been located nearby, there wasn't going to be
15 an impact because the habitat that you were
16 surveying at the time was unoccupied?

17 DR. HUFFMAN: Could you re-ask the
18 question?

19 MS. HOLMES: Did you make an assumption
20 when you reached your conclusions about the Morro
21 shoulder-banded snail that there wasn't a
22 significant impact to certain areas because the
23 area was unoccupied habitat?

24 DR. HUFFMAN: I did, in part. But I
25 also took into account that the snail might be

1 there potentially; or it could move to that area.
2 And that we were providing mitigation measures,
3 working through Carol Tyson of the U.S. Fish and
4 Wildlife Service, protective measures to avoid
5 take, or to minimize take.

6 And having biological monitors onsite.
7 And programs for protection of the snail, that we
8 believe that it's mitigated below a significant
9 level.

10 MS. HOLMES: That wasn't my question.
11 My question was whether or not you reached a
12 conclusion about whether or not there was a lack
13 of significant impact to some areas that you
14 surveyed because it wasn't suitable -- it was
15 unoccupied habitat.

16 MR. ELLISON: If I could just ask you to
17 clarify the question, because I think the
18 confusion may arise as between a finding that
19 mitigation measures are necessary in the nature of
20 what Dr. Huffman just described, versus a finding
21 that there is significance to the habitat such
22 that there has to be compensation for the taking
23 of the habitat.

24 MS. HOLMES: I'm --

25 MR. ELLISON: Which -- are you asking?

1 MS. HOLMES: -- I'm simply referring to
2 his statements that he made early on in his
3 testimony about making a significance
4 determination under CEQA, depending upon whether
5 or not habitat was actually occupied. That's the
6 context in which I'm asking the question.

7 MR. ELLISON: Okay, so you're asking,
8 under CEQA, and for the -- there's a -- I want to
9 be clear here -- there's a -- you can make a
10 finding that there's a potentially significant
11 impact which can be mitigated by simply taking
12 measures to insure that there's monitoring for the
13 species, et cetera. Or you can make a finding
14 that there's a significant impact that can only be
15 mitigated by compensation for taking the habitat.

16 That's my question, which way are you
17 asking that?

18 MS. HOLMES: Well, you can ask your own
19 witness that question on redirect if you like.
20 I'm trying to get back to the point that he was
21 making earlier on in his testimony about CEQA
22 impacts and their significance being dependent
23 upon whether or not habitat was occupied.

24 MR. ELLISON: Well, we'll have
25 continuing dialogue about this, but I will just

1 state my objection that I think your question is
2 unclear with respect to what you're saying.

3 HEARING OFFICER FAY: Dr. Huffman, why
4 don't you just clarify in your answer. Tell us
5 exactly the question that you believe you're
6 answering.

7 DR. HUFFMAN: Okay. What I believe I'm
8 answering is that if the habitat is occupied, or
9 we determine that it's essential for a species for
10 its survival, then therein lies a potential for a
11 significant impact.

12 And what we did is we looked at
13 mechanisms to protect those species through
14 various mitigations of fencing, avoidance of the
15 habitat, having biological monitors onsite to
16 reduce that impact below a significant level.

17 HEARING OFFICER FAY: Ms. Holmes, any
18 further questions?

19 MS. HOLMES: Yes, I do. Earlier on you
20 stated that you believed that the habitat in which
21 you found the snail at San Luis Obispo was
22 atypical, is that a correct summary of your
23 testimony?

24 DR. HUFFMAN: Yes, I said that.

25 MS. HOLMES: Is the same thing true for

1 the satellite parking area?

2 DR. HUFFMAN: Yes.

3 MS. HOLMES: Does this mean that the
4 snail is behaving atypically, or perhaps that we
5 don't know very much about what suitable habitat
6 is?

7 DR. HUFFMAN: What I mean by that is
8 that the type of habitat that it's found in is
9 atypical of what is described as the habitat that
10 is associated with Morro shoulder-banded snail,
11 which is in the California natural diversity
12 database. There's a description of habitat. And
13 the U.S. Fish and Wildlife Service also provides a
14 critical habitat discussion which is in the
15 Federal Register.

16 And they describe the habitat that you
17 would find the Morro shoulder-banded snail in as
18 being sand or sandy soils with a slope of less
19 than 10 percent. And if these soils, either being
20 vegetated by dune-type plants, or that they have
21 the ability to become vegetated with dune plants.

22 MS. HOLMES: But given the fact that
23 you've now found them in habitat that don't reach
24 the definitions in the documents that you've
25 described, are you still claiming that other such

1 areas, in other words areas that are similar to
2 those in which you found them more recently at
3 Camp San Luis and the satellite parking area,
4 should not be surveyed for snails?

5 DR. HUFFMAN: Well, we've surveyed other
6 areas there, as well, if that's what you're
7 asking.

8 MS. HOLMES: I'm asking you whether or
9 not, even though the habitat type where you found
10 them recently may not be listed in the reference
11 documents you've used, whether or not you're
12 concluding that habitats that are similar that may
13 be affected by the project should be considered to
14 be unsuitable habitat.

15 DR. HUFFMAN: Well, if they're clay
16 soils and they're moist clay soils with rock
17 outcroppings and drainage areas, there's
18 associated debris and vegetation types where the
19 snails could have moisture and cover, that seems
20 to be, based on what we've done so far, that seems
21 to be the type of habitat that these types of
22 Morro shoulder-banded snails, which now being
23 found in atypical habitat, they're found
24 throughout the areas we've examined in the Chorro
25 Valley --

1 MS. HOLMES: So would it be appropriate
2 to consider other similar areas that may be
3 affected by the project as potential habitat
4 areas?

5 DR. HUFFMAN: Well, I think they need to
6 be looked at. And as a precaution we are
7 proposing to continue to do protocol surveys in
8 the grassland areas adjacent to these types of
9 habitats I've described, to assure ourselves that
10 the snail is not there.

11 MS. HOLMES: Okay, thank you. Those are
12 all the questions I have.

13 HEARING OFFICER FAY: Okay. Thank you.
14 CAPE, do you have cross-examination?

15 MR. NAFICY: Yes.

16 HEARING OFFICER FAY: I'd just ask you
17 to keep it as brief as possible so that --

18 MR. NAFICY: I'll --

19 HEARING OFFICER FAY: -- so we can leave
20 you time in the evening to work with your
21 witnesses.

22 MR. NAFICY: I'll do my best, but I
23 can't sacrifice one for the other. So, --

24 //

25 //

CROSS-EXAMINATION

BY MR. NAFICY:

Q I want to carry on with this discussion of the shoulder-band snail. Dr. Huffman, I believe you stated, and correct me if I'm wrong, but did you state that you can't conclude that there's been adverse impacts to occupied habitat unless the area is quote, critical to the survival of the species? Is that a mischaracterization?

DR. HUFFMAN: I'm not sure I understand the question.

MR. NAFICY: Okay. I wonder if this statement could be attributed to you correctly: Is it true that you can't consider an impact adverse to occupied habitat unless you also conclude that that occupied area is, quote, critical to the survival of the species, of that particular endangered species.

DR. HUFFMAN: Well, but I'm not referring to critical habitat, but I'm saying it's essential to the habitat survival. And since you brought the question up about the snail, the types of habitats that we're finding the snail in, in Camp San Luis Obispo and in the Chorro Valley, I would say that the moist clay soil in drainages

1 with debris and with vegetation that would allow
2 them to be located in areas that have lots of
3 moisture, that would be essential for them.

4 MR. NAFICY: Okay. Are you familiar
5 with the definition of take under the Endangered
6 Species Act?

7 DR. HUFFMAN: Yes.

8 MR. NAFICY: Okay, now is it true that
9 if habitat, occupied habitat is adversely modified
10 such that a species is actually injured by that
11 adverse modification, wouldn't that constitute
12 take?

13 DR. HUFFMAN: Yes.

14 MR. NAFICY: Okay, so any habitat that
15 is occupied and then it's degraded or adversely
16 modified, you know, in this project in such a way
17 that it can't be occupied by, you know, the
18 snails, in that area, would you consider that
19 take?

20 DR. HUFFMAN: Well, it would have to be
21 suitable for the snails.

22 MR. NAFICY: Well, the definition was
23 that it's occupied habitat, so it would have to be
24 suitable.

25 DR. HUFFMAN: That's correct.

1 MR. NAFICY: Okay, then any adverse
2 impact of occupied habitat would be take, would
3 you agree with that?

4 DR. HUFFMAN: It would probably end up
5 being under harassment, which is part of take, or
6 it would be some kind of modification.

7 MR. NAFICY: Okay, now do you agree then
8 that if adverse modification of habitat
9 constitutes take under the Endangered Species Act,
10 that that would be a significant impact under
11 CEQA?

12 DR. HUFFMAN: If you had the take, yes.
13 But if you avoided it, no.

14 MR. NAFICY: Okay.

15 DR. HUFFMAN: Or minimized it, yeah.

16 MR. NAFICY: Very well. I want to also
17 discuss briefly with you this notion of atypical
18 habitat. In the errata that corrected testimony
19 that was filed, it stated that, you know, the
20 areas that were occupied, it appears that in
21 general areas where live snails were found were
22 moist, while dry areas lack evidence of snail
23 occupation, past or present. That's on page 18.

24 Could you state, what is the type of
25 evidence of occupation that you look for in the

1 habitat that you're surveying?

2 DR. HUFFMAN: The surveys were done to
3 look for either actual living snails or shells
4 that are vacant.

5 MR. NAFICY: Okay, so if you didn't
6 find, you know, snail shells, you concluded that
7 that area was not occupied?

8 DR. HUFFMAN: Well, -- yes.

9 MR. NAFICY: Okay. Now, you say that it
10 seems a critical distinction between habitat that
11 is occupied and that's not occupied is moisture,
12 is that correct?

13 DR. HUFFMAN: Yes.

14 MR. NAFICY: But isn't it true that an
15 area that is dry today could be moist tomorrow?

16 DR. HUFFMAN: Well, it depends on levels
17 of moisture, what degree of moisture are we
18 talking about?

19 MR. NAFICY: Well, I'm not sure what
20 level of moisture snails require, but, you know,
21 let's say it rains for three days. So wouldn't
22 that make the entire area that, you know, you
23 previously considered unoccupied, wouldn't that
24 turn it into suitable habitat because it's now
25 moist, according to whatever level you want to

1 choose?

2 DR. HUFFMAN: There's a potential for
3 that, but in the low-lying areas and the ditch
4 areas, and the rocky outcroppings, the soils are
5 clay-ier, have more clays. And so their surface
6 is going to hold water longer.

7 And the grasslands I'm referring to, in
8 large part, the laydown area, as well as the paved
9 surfaces, the water is going to move through there
10 fairly quickly. And it does not seem to be the
11 kind of habitat that the snails, from what we know
12 now, from our evaluations, prefer.

13 MR. NAFICY: I understand. I mean I
14 appreciate that, you know, we don't seem to know a
15 whole lot about what types of habitat may be
16 suitable for shoulder-band snail and perhaps these
17 studies are advancing that, but given the recent
18 modifications we've had to make in our thinking
19 about what's suitable habitat, I'm wondering why
20 you feel confident drawing conclusions about, you
21 know, whether grassland that may remain moist for
22 x number of days would or would not be habitat.

23 I mean are you referring to work other
24 than the recent studies that Duke has done?

25 DR. HUFFMAN: I'm referring to the

1 recent studies that Duke has done, and where all
2 they've been found in the Chorro Valley. The same
3 pattern occurs at North Point, which is north of
4 the Morro Bay Power Plant. Same pattern occurs in
5 the area near CalPoly where the snail was found.
6 The same type of habitat, conditions were found
7 north, on the north portion of the Camp San Luis
8 Obispo. The same kind of conditions were found
9 within the satellite parking area. And we found
10 the same kind of conditions at the laydown site.

11 So we have a fairly broad geographic
12 area that are telling us that we are finding the
13 snails in those micro habitat conditions.

14 It's the same thing as when you talk
15 about the snail in relationship to sand dunes.
16 You don't find the snail in its classic habitat in
17 open, bare sand, with no vegetation around. That
18 would be fairly untypical of that finding.

19 And so we're -- I'm not saying it's 100
20 percent. We don't know everything yet. But I'm
21 saying that that trend is there, and that's what
22 we're using to develop our protection measures
23 with U.S. Fish and Wildlife Service, so that we
24 minimize the impact and harm to the species.

25 MR. NAFICY: Okay, but you -- I

1 understand that you're characterizing the type of
2 habitat based on the geography where you found the
3 snails. But do you think that you can draw
4 conclusions from your studies as to what
5 atmospheric conditions would actually make a
6 certain habitat suitable in terms of what level of
7 moisture, how many days of rain and all that?

8 I mean, is there enough data out there,
9 from what you've studied, to draw conclusions
10 about level of moisture that's required?

11 DR. HUFFMAN: Not precisely, but if you
12 look at the area there's distinct micro habitats,
13 for example, in the laydown area. And that's
14 where you find -- it's like, you know, where would
15 you expect to find a frog that would be breeding?
16 It's a breeding pond. It's an aquatic area.

17 What we're finding at Camp San Luis
18 Obispo is we're finding it in areas that are
19 unique micro habitats. So, I'm drawing my
20 conclusions from that.

21 MR. NAFICY: It seems, though, that, you
22 know, you've had to -- we've all had to modify our
23 views of snail habitat that previously was with
24 one type of soil, and now we have expanded that.

25 It seems to me that there's probably

1 room for us to understand a whole lot more. I
2 don't want to debate this with you, but I just
3 don't see how, based on one year's worth of study
4 in five locations you can identify micro habitats,
5 and then argue that these are the conditions that
6 are needed for a snail.

7 I want to move on. I want to talk,
8 there's a statement in here on page 18, second
9 paragraph, last line. It says: Duke believes
10 that the Morro shoulder-band snail population
11 encountered within the staging and laydown areas is
12 not a rare or unique population.

13 Now, I am confused, because I thought
14 that endangered species are, by definition, rare
15 and unique, and yet you're stating here that these
16 populations that are some populations apparently,
17 or some percentage of a population of an endangered
18 species are not unique or rare. How does that
19 work? Can you explain?

20 MR. ELLISON: I'm going to ask you to
21 restate the question. That was quite a long
22 speech. But specifically I'm going to ask you
23 what was the page reference that you gave?

24 MS. HOLMES: Yeah.

25 MR. NAFICY: Page 18, second paragraph,

1 last line of your errata.

2 I can try to simplify my question. The
3 question is how do you square away the definition
4 of an endangered species with the statement here
5 that these populations that you have found are not
6 rare or unique.

7 DR. HUFFMAN: Well, I think federally
8 listed, you know, the population is an endangered
9 species, you know. So it is unique.

10 What we're referring to in the text that
11 you read is that initially there was discussion
12 that with this new find at Camp San Luis Obispo,
13 given the size, their size, that they seemed to be
14 smaller than the snail found in other portions of
15 the Chorro Valley, as well as the classic type of
16 snail that's found out in the south dune area, or
17 the Los Osos area. And so we were really
18 referring to the size.

19 And then what we found was that the
20 initial information that was presented, sizes of
21 shells included both juveniles and adults. And
22 when we looked at adults, the sizes are more
23 uniform, and it's not a unique -- the concept of
24 pygmy snail was introduced, and it is not a unique
25 population from that standpoint.

1 But it is still federally protected, and
2 it's still listed as endangered.

3 MR. NAFICY: So I understand. So what
4 you're saying is that the ones that were found in
5 this area share the same physical characteristics
6 as the other known specimens within the
7 population?

8 DR. HUFFMAN: Yes.

9 MR. NAFICY: Okay. Now, there were also
10 some shells found within the actual plant, I
11 believe, in an area that is used for -- I'm not
12 sure what it was used for, actually, I don't
13 remember. But there were some dead, some shells
14 found within the current site, is that correct?

15 DR. HUFFMAN: That's correct.

16 MR. NAFICY: Now, can you describe the
17 habitat where these shells were found?

18 DR. HUFFMAN: Yes. Several of them were
19 found on pieces of cardboard and broken lumber
20 within some property that's owned by PG&E. It's
21 called the PG&E boneyard, where they have
22 equipment and materials that are going to be
23 salvaged.

24 We also found it at the edge of a large
25 hill area that is primarily dominated by iceplant.

1 There was, I think, two or three shells found
2 there.

3 So that's the kind of habitat we found
4 them in.

5 MR. NAFICY: Did you ever find out how
6 the ones that ended up in the boneyard area ended
7 up there?

8 DR. HUFFMAN: No, they didn't talk to
9 us, so we had no idea.

10 (Laughter.)

11 MR. NAFICY: Did you figure out how old
12 they were?

13 DR. HUFFMAN: No, we didn't do ring
14 studies.

15 MR. NAFICY: Okay. So, as far as we
16 know, I mean we don't really know whether they
17 actually lived there or they were transported
18 there or anything like that?

19 DR. HUFFMAN: No, we don't. We're
20 making the assumption that there is the potential
21 that there is a population, and that we have
22 developed protective measures. And will continue
23 to do that with Carol Tyson of the U.S. Fish and
24 Wildlife Service.

25 MR. NAFICY: Okay. I have just really

1 very few questions left, and they have to do with
2 steelhead.

3 I understand that steelhead were
4 observed in Chorro Creek? That's on page 19.

5 DR. HUFFMAN: Yes.

6 MR. NAFICY: Okay. The discussion of
7 steelhead on page 19 talks about, it says: To our
8 knowledge no steelhead trout have been observed in
9 the stream adjacent to the proposed construction
10 staging and laydown areas, or the -- intermittent
11 drainages that will be impacted.

12 No impact to the species is expected
13 because suitable stream habitat will not be
14 affected.

15 First of all, has the potential impacts
16 on steelhead, both at Chorro and Morro Creeks,
17 been discussed with the National Marine Fisheries
18 Service?

19 DR. HUFFMAN: Just a second, let me
20 confer.

21 (Pause.)

22 DR. HUFFMAN: I think the best way to
23 say this is that we put this information in the
24 biological assessment, and we provided that
25 information and discussed this information with

1 the U.S. Fish and Wildlife Service, as well as the
2 National Marine Fisheries Service.

3 MR. NAFICY: So the information was
4 provided to the National Marine Fisheries Service?

5 DR. HUFFMAN: Yes.

6 MR. NAFICY: This discussion here on
7 page 19 seems to indicate that there will be no
8 impact whatsoever, it seems, to the suitable
9 stream habitat. Has that stream, itself, been
10 characterized in terms of which portions of it may
11 constitute suitable habitat?

12 DR. HUFFMAN: That's really a
13 determination that we asked the Service and the
14 National Marine Fisheries Service to make.

15 I might clarify that the only impact
16 that we're having on a, let's call it a water
17 course, is a small drainage that runs along
18 O'Connor Way. We're not impacting Chorro Creek
19 and we're not impacting the unnamed creek that
20 lies to the south of laydown area E. It's just a
21 small drainage that only becomes wet during
22 stormwater runoff periods. It's not perennial.

23 MR. NAFICY: So there's no chance of
24 this laydown area contributing to a sediment load
25 on Chorro Creek?

1 DR. HUFFMAN: Well, there's a potential,
2 but we've instituted stormwater management plans,
3 prepared those; as well as other types of spill
4 prevention plans. And biological mitigation and
5 implementation plans, and monitoring to assure
6 that we stay within the minimum water quality
7 standards.

8 MR. NAFICY: Okay, so has there been a
9 401 certification done for this culvert that
10 you're talking about?

11 DR. HUFFMAN: Not at this time, no.

12 MR. NAFICY: Okay. And is this going to
13 require a 404 permit, do you know?

14 DR. HUFFMAN: We believe so, yes.

15 MR. NAFICY: Okay, and have you
16 contacted the Corps about discussing the potential
17 impacts?

18 DR. HUFFMAN: We've had general
19 discussions; we've not filed a permit application
20 yet. But it would be a culvert crossing.

21 MR. NAFICY: Okay, thank you, nothing
22 further.

23 HEARING OFFICER FAY: Thank you, Mr.
24 Naficy. Does the City have any cross-examination?

25 MR. SCHULTZ: Yes. The City has just a

1 couple questions, and I swear just a couple.

2 We'll be quick.

3 CROSS-EXAMINATION

4 BY MR. SCHULTZ:

5 Q First, I want to clear up a little
6 confusion. If we can get the first map -- can we
7 get the first map up there?

8 The questions that I have for you,
9 Doctor, has to do with the area that's south of
10 the Creek and west of the PG&E plant.

11 That will work. Do you understand what
12 I'm talking about, it's designated as area 2,
13 which is this area right here. It's west of the
14 tank farm --

15 DR. HUFFMAN: Okay, I see it.

16 MR. SCHULTZ: Was any protocol studies
17 or any -- studies done in that area?

18 DR. HUFFMAN: Yes. Along the route and
19 100 feet each side of the temporary access route
20 south of Morro Creek we did protocol surveys for
21 the Morro shoulder-band snail.

22 MR. SCHULTZ: And what was the results
23 of that?

24 DR. HUFFMAN: We did not find any
25 evidence of them.

1 MR. SCHULTZ: So that's the area which I
2 consider west of the tank farm and east of the
3 access road and south of the Creek?

4 DR. HUFFMAN: Yes.

5 MR. SCHULTZ: And you mentioned earlier
6 in your testimony, which I want to clear up, that
7 about .33 acres were going to be impacted next to
8 the Morro Creek, and I believe your testimony was
9 that that was ESHA designated by the City.

10 And I'd like to clear that testimony up
11 with you. I'd like to show you the local coastal
12 plan for the City of Morro Bay and the zoning maps
13 and have you look at those two.

14 If you could turn to page 186 of the
15 City of Morro Bay's local coastal plan, and then
16 that is also on the overhead projector, which it's
17 figure 28 of the environmental sensitive habitat
18 area for the City of Morro Bay.

19 It's my understanding from the reading
20 of this map that the only area that's been
21 designated by the City of Morro Bay as an
22 environmental sensitive habitat area is only the
23 Creek area. And that in fact the area which is
24 south of the Creek where you did your protocol
25 studies is not designated as environmental

1 sensitive habitat area, is that correct?

2 DR. HUFFMAN: That's correct.

3 MR. SCHULTZ: And if you could look at
4 the zoning map that I provided you, what is that
5 area designated as?

6 DR. HUFFMAN: Are you referring to these
7 large maps?

8 MR. SCHULTZ: Correct.

9 DR. HUFFMAN: Okay. It's designated as
10 OA-1 (PD).

11 MR. SCHULTZ: Okay, thank you. If you
12 could turn to page 52 of the City's local coastal
13 plan, policy 120-1A. Is it true that that area
14 then that I've been discussing which is south of
15 the Creek, west of the plant, east of the access
16 road is designated for use as commercial fishing
17 industry for storage, haul-out and boat
18 construction? That's policy 1.18 on page 52.

19 DR. HUFFMAN: Yes, that's what it says.

20 MR. SCHULTZ: Okay, thank you. No
21 further questions.

22 HEARING OFFICER FAY: Mr. Schultz, are
23 those documents in the record of this case?

24 MR. SCHULTZ: I'd like to have just the
25 map that was just put up as an exhibit, if we

1 could have that marked and entered. Which is page
2 186 of the City of Morro Bay's local coastal plan.

3 HEARING OFFICER FAY: And is the local
4 coastal plan an exhibit in this record?

5 MR. SCHULTZ: I'm not sure.

6 HEARING OFFICER FAY: It is not. Well,
7 you're going to have to provide that to the
8 docket, that exhibit.

9 MR. SCHULTZ: Okay.

10 HEARING OFFICER FAY: And hold on while
11 we identify --

12 MR. OKUROWSKI: Are we identifying two
13 new exhibits here, Mr. Fay?

14 HEARING OFFICER FAY: Sorry?

15 MR. OKUROWSKI: Are we identifying two
16 new exhibits, the map and the local coastal plan?

17 HEARING OFFICER FAY: Well, what are you
18 asking, Mr. Schultz? Do you want that --

19 MR. SCHULTZ: I would suggest then we
20 move -- we will docket the entire coastal, local
21 coastal plan, because it has been cited a few
22 times, not only in my previous testimony, but in,
23 I think, even staff's testimony.

24 MR. OKUROWSKI: Is the map that Dr.
25 Huffman looked at in the local coastal plan, when

1 he flipped through and identified --

2 MR. SCHULTZ: No, it's not. The zoning
3 maps are not, so that should be a separate
4 exhibit, also.

5 MR. OKUROWSKI: So --

6 HEARING OFFICER FAY: -- two exhibits,
7 all right. Would you identify in detail the first
8 one, and I'll give it an exhibit number.

9 MR. SCHULTZ: The first one would be the
10 Morro Bay coastal land use plan. And the second
11 one would be the City of Morro Bay's certified
12 zoning map.

13 HEARING OFFICER FAY: The first one is
14 exhibit 226; and the second one exhibit 227. And
15 you will provide copies of each of these to the
16 docket --

17 MR. SCHULTZ: Yes, I will.

18 HEARING OFFICER FAY: -- and serve
19 parties?

20 MR. SCHULTZ: Yes.

21 HEARING OFFICER FAY: Could I have the
22 name of the map, again?

23 MR. SCHULTZ: It's the certified zoning
24 map for the City of Morro Bay.

25 HEARING OFFICER FAY: Okay.

1 Mr. Ellison, any redirect?

2 MR. ELLISON: Yes, I do, I have a couple
3 of questions.

4 REDIRECT EXAMINATION

5 BY MR. ELLISON:

6 Q First of all, Dr. Huffman, Mr. Naficy
7 asked you some questions about moist habitat.
8 When you survey, specifically for the Morro
9 shoulder-band dune snail, is there a condition
10 that you do that after a certain type of weather?

11 DR. HUFFMAN: Yes. For protocol surveys
12 it's required that you do it after rains, light or
13 heavy rains, so that the substrata is moist and it
14 provides an opportune time to actually see a
15 snail.

16 I might add, in the case of the Chorro
17 Valley, what we're finding is that we're finding
18 just as many snails when it was not raining, and
19 you had these protocol type conditions. It
20 doesn't really mean anything. I think you still
21 have to follow protocol conditions, but it does
22 show that they do find moist areas, and they
23 inhabit those. And that's what I've been talking
24 about.

25 MR. ELLISON: Ms. Holmes asked you

1 several questions that go to an issue that I think
2 there is going to be quite a bit of discussion
3 today, about how far away you should put habitat
4 from the location of an identified species. Do
5 you recall those questions?

6 DR. HUFFMAN: Yes.

7 MR. ELLISON: First of all, this is an
8 issue, do you understand that this is an issue
9 arising under CEQA?

10 DR. HUFFMAN: Yes.

11 MR. ELLISON: And am I correct that
12 there are significance criteria for biological
13 resources for CEQA?

14 DR. HUFFMAN: Yes, there are CEQA
15 guidelines for biological resources.

16 MR. ELLISON: Okay. And specifically by
17 CEQA guidelines I'm referring to section 15387 of
18 Title 14 of the California Code of Regulations.

19 Under part G, Roman numeral IV,
20 biological resources, there are several
21 significance criteria. Are you familiar with
22 those?

23 DR. HUFFMAN: Yes.

24 MR. ELLISON: Incidentally, I do have
25 copies of this if it would facilitate the

1 understanding of the Committee, we can hand these
2 out, if you want.

3 MS. HOLMES: I'd just like the citation
4 again that you're referencing.

5 MR. ELLISON: I'm referring to appendix
6 G, CEQA guidelines, 15387, Title 14.

7 HEARING OFFICER FAY: Yeah, if you could
8 do that while you're working, that would be great,
9 have somebody hand it out.

10 MS. HOLMES: 15387 is the definition of
11 urbanized areas?

12 MR. ELLISON: Dr. Huffman, do you have a
13 copy of a document entitled, Barkley's California
14 Code of Regulations, section 15387, Title 14, with
15 a series of boxes to be checked under four
16 columns. And on the left side a description of
17 various significance criteria?

18 DR. HUFFMAN: Yes, I do.

19 MR. ELLISON: And at the top of the page
20 it refers to biological resources, do you see
21 that?

22 DR. HUFFMAN: Yes.

23 MR. ELLISON: And under subsection A,
24 there is the following description: Have a
25 substantial adverse effect, either directly or

1 through habitat modifications, on any species
2 identified as a candidate, sensitive, or special
3 status species in local or regional plans,
4 policies or regulations, or by the California
5 Department of Fish and Game, or the U.S. Fish and
6 Wildlife Service, do you see that?

7 DR. HUFFMAN: I do.

8 MR. ELLISON: When you referred to
9 occupied habitat, were you referring to habitat
10 that is protected under this significance
11 criteria?

12 DR. HUFFMAN: Yes, I am.

13 MR. ELLISON: And was your point that
14 the habitat has to be -- that you're not
15 protecting the habitat for its own sake, but that
16 you have to find that there's a substantial
17 adverse effect through the habitat modification on
18 the species?

19 DR. HUFFMAN: Yes.

20 MR. ELLISON: So, let me get to this
21 question of how far away you go from the location
22 of a species.

23 Using that significance criteria don't
24 you have to show a nexus between the habitat in
25 question and an actual adverse effect on the

1 species, as opposed to an effect on the habitat?

2 DR. HUFFMAN: Yes, I believe that.

3 MR. ELLISON: Okay. And in making that
4 judgment, do you take into account the typical
5 behaviors of the species in question?

6 DR. HUFFMAN: Yes.

7 MR. ELLISON: So, for example, for a
8 species that's relatively mobile, if you had an
9 endangered fox or something of that kind, the
10 distance that you might go to would be greater
11 than if you had a relatively less mobile species,
12 like a snail?

13 DR. HUFFMAN: Yes, that's what we would
14 do.

15 MR. ELLISON: Okay.

16 That's all I have, thank you.

17 HEARING OFFICER FAY: All right. Any
18 recross, Ms. Holmes?

19 MS. HOLMES: No.

20 HEARING OFFICER FAY: Any other parties?

21 MR. NAFICY: I just have one question.

22 HEARING OFFICER FAY: Within the scope
23 of the --

24 MR. NAFICY: Yeah, just one question.

25 //

1 RE CROSS-EXAMINATION

2 BY MR. NAFICY:

3 Q Isn't under CEQA guidelines restricting
4 the range of a special status species also
5 considered a significant impact? If you know?

6 A Let me just take a second. Could you
7 restate your question?

8 Q No. Actually I can repeat it, probably
9 not restate it. The question is isn't it also
10 true that under the CEQA guidelines an impact on
11 habitat is considered significant if it restricts
12 their range of a special status species?

13 A Within that range, yes. If it does
14 restrict it, yeah.

15 Q Right, so if habitat that is suitable
16 for occupation is adversely modified such that
17 it's no longer suitable for occupation, wouldn't
18 that be -- and if it's contiguous with occupied
19 habitat, wouldn't that effect a restriction in the
20 range of a special status species?

21 MR. ELLISON: Can I ask you to clarify,
22 when you say contiguous.

23 MR. NAFICY: Next to, adjacent to,
24 connected.

25 MR. ELLISON: All property is ultimately

1 connected to all other property until you reach --
2 I'm not sure what you mean by that. I really
3 don't know what you mean by that.

4 MR. NAFICY: Okay.

5 MR. ELLISON: Can you try and clear --

6 (Laughter.)

7 MR. ELLISON: We're not trying to be
8 difficult here, but I don't know what you mean.

9 MR. NAFICY: Okay, let me try to make it
10 easy. There's some habitat that is occupied by
11 shoulder-band snail and habitat just adjacent to
12 it that is not currently occupied. But may be
13 suitable for occupation.

14 Would adversely modifying the now
15 presently unoccupied adjacent habitat restrict the
16 range of shoulder-band snail that is in the
17 adjacent suitable occupied habitat?

18 MR. ELLISON: If I can just -- do you
19 want him to assume in this question that this
20 species has an identified range, this particular
21 population? And that the habitat that you're
22 referring to that's unoccupied is within that
23 range?

24 MR. NAFICY: No, I'm not asking him to
25 assume anything. I don't know what you mean by a

1 range. But I mean I'm using it as a normal sense
2 of the word.

3 So, I'm assuming that if habitat is
4 suitable for occupation, and it's adjacent to
5 occupied habitat, that that's within the range of
6 that species, because it's, you know, it's
7 suitable habitat.

8 So, I'm not asking him for any special
9 definition of range.

10 MR. ELLISON: Well, I think it's
11 important to understand the question, because
12 you're talking about restricting the range. I
13 think it's important that you clarify, are you
14 asking him to assume that this habitat is within
15 the range of this particular --

16 MR. NAFICY: Yes, --

17 MR. ELLISON: -- particular population?

18 MR. NAFICY: Yes.

19 MR. ELLISON: Okay.

20 DR. HUFFMAN: It's going to relate to
21 whether or not it's successful to the species.
22 And you're asking the question that it's just all
23 continuous, there's no change in habitat
24 conditions, there's no differences in the micro
25 habitats, it's all the same habitat. Is that what

1 you're asking?

2 MR. NAFICY: No, I'm just -- the
3 hypothetical is that it's suitable, whatever that
4 definition is. That it's possible for it to be
5 occupied.

6 So, I'm not making any assumptions about
7 absolute uniformity across. The only
8 qualification is that the habitat is suitable for
9 occupation.

10 DR. HUFFMAN: Well, hypothetically, if
11 it's suitable and it's connected, then there could
12 be a potential for significant impact.

13 MR. NAFICY: Okay. Nothing further,
14 thanks.

15 HEARING OFFICER FAY: Okay. Does the
16 City have any recross? Okay.

17 COMMISSIONER BOYD: Mr. Chairman, could
18 I direct a question to the gentleman from the
19 City?

20 HEARING OFFICER FAY: Sure.

21 COMMISSIONER BOYD: If you might, sir.
22 I've been pondering your questioning and trying to
23 get to a meaning to myself, anyway. And let me go
24 back over what my understanding is to make sure
25 I'm correct.

1 You defined and redefined, several
2 times, for clarity a particular piece of land.
3 You then had it identified as not being within the
4 boundaries of your local coastal zone plan.

5 And then you made the point that per
6 your local zoning it's a piece of, in effect,
7 commercial property. Did I understand that
8 correctly?

9 MR. SCHULTZ: Under our local coastal
10 plan designation it's open area which can be used
11 under certain circumstances. It wouldn't be
12 commercial, --

13 COMMISSIONER BOYD: All right, --

14 MR. SCHULTZ: -- but it can be used
15 by --

16 COMMISSIONER BOYD: Used by the
17 fishermen, et cetera?

18 MR. SCHULTZ: Correct.

19 COMMISSIONER BOYD: Okay, thank you.

20 HEARING OFFICER FAY: Okay. Ms. Holmes,
21 for the record, you estimated ten minutes for
22 staff on direct. Do you still believe that that
23 is your estimate?

24 MS. HOLMES: I think in light of some of
25 the discussions that we've had it may be a tad

1 longer.

2 HEARING OFFICER FAY: Okay, then we're
3 going to take a ten-minute break and we will start
4 in ten minutes with Ms. Holmes.

5 (Brief recess.)

6 HEARING OFFICER FAY: We are back on the
7 record now. And I understand that we have Dan
8 Chia of the California Coastal Commission linked
9 up by phone. Are you there, Dan?

10 MR. CHIA: Yes, I am. Can you hear
11 me --

12 HEARING OFFICER FAY: And, Dan, my
13 understanding is that you tuned in about the time
14 that Duke began presenting its terrestrial biology
15 testimony, is that correct?

16 MR. CHIA: I believe so, yes. Can you
17 hear me, Mr. Fay?

18 HEARING OFFICER FAY: I'm sorry, Dan, I
19 can't hear you.

20 MR. CHIA: Okay. Can you hear me now?

21 HEARING OFFICER FAY: No. They're just
22 going to have to turn up -- we can't hear you.

23 MR. CHIA: Okay.

24 HEARING OFFICER FAY: Are you able to
25 hear the testimony?

1 MR. CHIA: Yes, I am.

2 HEARING OFFICER FAY: Okay, very good.

3 Did you want to make a comment at this time?

4 MR. CHIA: Can you hear me okay now?

5 HEARING OFFICER FAY: Yes.

6 MR. CHIA: Okay. The only comment I
7 want to make; it's in response to the City's
8 testimony, with respect to the area south of the
9 Creek, east of the road and west of the plant.

10 It's my understanding that some of those
11 areas, or portions of those areas lie within the
12 Coastal Commission's original permit jurisdiction,
13 and thus fall outside of the scope of the City's
14 LCP.

15 I have maps in front of me. Now, in
16 order to specifically determine what they're
17 talking about we would need to do a boundary
18 determination, but as shown on the maps I have in
19 front of me, I believe most of those areas in
20 question are within the Coastal Commission's
21 original permit jurisdiction.

22 And to the extent that our biologist
23 feels that those areas should be protected or
24 should be designated as ESHA, you know, we would
25 certainly not consider -- it's possible that we

1 would not consider many of the development types
2 that the City contemplates in those areas, as
3 appropriate for ESHA habitat.

4 That's all.

5 HEARING OFFICER FAY: Okay. The
6 Chairman wanted to give the City a chance to
7 respond if you have a response on that.

8 MR. SCHULTZ: The only response was I
9 said it could or couldn't be developed, and we do
10 agree it's broader than in the original
11 jurisdiction, -- boundary -- be done. But
12 regardless of whether it's in or out the
13 jurisdiction, the fact remains that it is
14 designated as open space currently and does allow
15 for that development currently under our zoning
16 map, and under our certified local coastal plan.

17 Whether we could -- because of the
18 studies that have been done recently is a whole
19 different question.

20 HEARING OFFICER FAY: Okay.

21 MR. CHIA: My point is that if those
22 areas are, in fact, within the Commission's
23 original jurisdiction, then the LCP does not
24 apply, including the underlying the zoning.

25 HEARING OFFICER FAY: Okay. Just want

1 to confirm with the court reporter that he was
2 able to get Mr. Chia's remarks on the record?
3 Good.

4 Okay, thank you, Dan.

5 MR. CHIA: You're welcome.

6 HEARING OFFICER FAY: And let us know if
7 there's any other times that you want to make
8 comments as we move along.

9 The next thing I'd like to do before we
10 move to staff's presentation is Ms. Colleen
11 Johnson had a comment she wanted to make orally
12 about alternative sites. And we'd like to
13 accommodate her.

14 I'm sorry, we're going to have to limit
15 you to three minutes because we have concluded
16 that area.

17 MS. JOHNSON: Yes, that's fine.

18 HEARING OFFICER FAY: Speak closely into
19 the microphone, please.

20 MS. JOHNSON: Okay, thank you. I didn't
21 know of the schedule, so I didn't know when to
22 take off work.

23 My name is Colleen Johnson and I'm a 13-
24 year resident of Morro Bay, and a 23-year resident
25 of San Luis Obispo County. I work as a dietitian

1 at a hospital in San Luis Obispo, providing
2 nutrition counseling to patients who have had
3 heart attacks and strokes.

4 Many of these patients are retirees from
5 cities that surround our County, Los Angeles, the
6 San Francisco Bay Area, Fresno, Bakersfield, who
7 have escaped from the city and retired to this
8 County to enjoy its natural beauty.

9 These patients often come into the
10 hospital with high blood pressure, high
11 cholesterol and a history of smoking. Their
12 health is failing them.

13 Just like these patients, the health of
14 the Morro Bay National Estuary is in danger. Like
15 blood pressure, it has the tides to deal with.
16 Instead of cholesterol buildup, it has
17 sedimentation clogging its arteries. And rather
18 than a cigarette, it has a power plant at its
19 mouth. And although this power plant, too, is
20 filtered, it nevertheless sucks oxygen and living
21 nutrients out of the estuary's blood supply.

22 The estuary is a fragile, living
23 environment. Obviously it is no place for a power
24 plant. Fifty years ago our predecessors did not
25 consider the estuary an important national asset.

1 Today we know better.

2 With scientific data available to us, we
3 now know of the fragile nature of the estuarian
4 environment. It is at risk and must be cared for
5 for future generations. There are few undeveloped
6 estuaries left in California. People from all
7 over California reap the benefits of the estuary.
8 People vacation here. They look forward to
9 retiring here. Future generations can learn
10 about nature and biological science here.

11 Decisions about the estuary should
12 consider not only the local population, but the
13 citizenry of all of California and generations to
14 come. Logic tells us that alternative sites for a
15 power plant make more sense. Gates Substation,
16 Lemoore or one of the state prison sites should be
17 carefully considered. A power plant inside a
18 national estuary is a bad idea.

19 A second point to consider is the issue
20 of allowing habitat enhancement to suffice for
21 mitigating the mortality of the marine population
22 of the Bay. Sedimentation and marine population
23 are two separate issues. Various agencies are
24 interested in measures to keep estuary
25 sedimentation at a minimum.

1 Duke Energy would like to build another
2 plant using estuary water to cool the plant. They
3 would like to pay money to programs reducing
4 sedimentation as mitigating measures. This would
5 help reduce sedimentation, but would not reduce
6 the high mortality rate of the marine population
7 of the Bay.

8 To explain this concept to my son I
9 might to need to use words such as bribe or
10 payoff. Therefore, we need an impartial governing
11 body to direct the overall health of the estuary.
12 This body should coordinate the efforts of the
13 National Estuary Program, Duke, the City
14 Councilmembers, all entities involved in the
15 future of the estuary.

16 In summary, please carefully consider
17 the two issues. Number one, choosing an
18 alternative site for a power plant. And number
19 two, appointing an impartial governing body to
20 oversee the health of the estuary.

21 Thank you.

22 HEARING OFFICER FAY: Thank you for your
23 comment.

24 Okay, Ms. Holmes.

25 MS. HOLMES: Staff's witnesses for

1 terrestrial biological resources are Dick
2 Anderson, Andrea Erichsen, and they both need to
3 be sworn.

4 HEARING OFFICER FAY: Would the
5 witnesses please stand, and will the court
6 reporter please swear them in.

7 Whereupon,

8 RICHARD ANDERSON and ANDREA ERICHSEN
9 were called as witnesses herein, and after first
10 having been duly sworn, were examined and
11 testified as follows:

12 DIRECT EXAMINATION

13 BY MS. HOLMES:

14 Q Mr. Anderson and Ms. Erichsen, did you
15 prepare the terrestrial biological resources
16 portion of what's been identified as exhibits 197
17 and 198?

18 MS. ERICHSEN: Yes.

19 MR. ANDERSON: Yes.

20 MS. HOLMES: And does exhibit 197
21 contain a statement of your respective
22 qualifications?

23 MS. ERICHSEN: Yes.

24 MR. ANDERSON: Yes.

25 MS. HOLMES: Do you have any corrections

1 to your testimony today?

2 MR. ANDERSON: Yes, we have a couple
3 changes. These are in response to Duke's rebuttal
4 questions that they had and things they wanted to
5 see changed. At least two of them are.

6 The first one is condition of
7 certification Biology-T-2 dealing with designated
8 biologist and biological monitors. And we did
9 accept Duke's wording, the changes they wanted, on
10 Bio-T-2.

11 What we need to do is there are a couple
12 changes in T-1 and T-3 that need to be made in
13 order to be consistent with the changes that we
14 made for Duke.

15 And we're going to make those and we
16 will provide them to you, instead of going into it
17 right now.

18 Biological-T-16 dealing with
19 conservation easements, Mr. Pollack discussed this
20 earlier. After Duke's comments, we simply agreed
21 to delete that whole condition. As far as we're
22 concerned you don't have to modify it, we'll just
23 delete it. We weren't aware at the time that you
24 wanted to maintain some amount of conservation
25 easement onsite. So we're very neutral on that.

1 And one of the reasons is that we
2 decided that there are rules to mitigate for
3 terrestrial resource impacts.

4 The third change isn't quite a change
5 yet. But we wanted to remind you that since the
6 recent siting of the Morro shoulder-band snail in
7 several locations, Camp San Luis and satellite
8 parking, we really can't finalize the mitigation
9 there until surveys are considered complete and we
10 have some discussion with the U.S. Fish and
11 Wildlife Service. We'd like to see their
12 biological opinion.

13 So that is still to come some time in
14 the future. It's been discussed quite a bit by a
15 number of people.

16 We would also like to discuss the final
17 findings and analysis with a number of other
18 agencies that also are interested in this.

19 MS. HOLMES: Thank you. Does that
20 complete your corrections to your testimony?

21 MR. ANDERSON: Yes.

22 MS. HOLMES: And with that are the facts
23 contained in the testimony true and correct?

24 MR. ANDERSON: Yes.

25 MS. HOLMES: And do the opinions

1 represent your best professional judgment?

2 MR. ANDERSON: Yes, they do.

3 MS. HOLMES: And do you adopt this are
4 your testimony today?

5 MR. ANDERSON: Yes.

6 MS. HOLMES: Can you please provide a
7 brief summary of your testimony.

8 MR. ELLISON: Actually, counsel, before
9 we begin doing that I just need to ask you for a
10 clarification. With respect to Bio-T-2, I
11 understood Mr. Anderson to say that there are
12 changes that will be forthcoming.

13 You know, obviously we haven't seen
14 them, and our witnesses have already testified.
15 If they're minor corrections, --

16 MS. HOLMES: I believe they are. We had
17 proposed our own language for Bio-T-2 in our
18 rebuttal testimony. And we noticed after we filed
19 it that it then became inconsistent with T-1 and
20 T-3, and the intent is simply to make them all
21 consistent.

22 MR. ELLISON: Okay. We can talk about
23 it on a break or whatever, but obviously until we
24 see them we really can't comment on them.

25 MR. ANDERSON: I mentioned the Morro

1 shoulder-band snail surveys at Camp San Luis and
2 the satellite parking area; I believe there may be
3 some continuing yet on the craft parking area
4 onsite.

5 In addition to that, there's some other
6 unfinished business, and I think Carol Tyson
7 mentioned it this morning, as others, but it had
8 to do with the fence along the access road.

9 In this case it's mostly north of Morro
10 Creek, but there is also fencing south of Morro
11 Creek. This other relates to the construction
12 access road. And until that agreement is made,
13 it's hard to understand a couple of things. It's
14 hard to understand exactly what the impacts will
15 be. And as you mentioned earlier, there's .28
16 acres of habitat that, as previously proposed, the
17 fence would -- those will be on the roadside of
18 the fence, which we consider to be los to traffic
19 and foot traffic and automobiles.

20 Once we know for certain where that
21 fence is located, that .28 acres of dune habitat
22 could be modified, or would be modified to fit the
23 final location.

24 I want to talk a little bit about the
25 valuable terrestrial resources that occur around

1 the various project sites, and how we feel will be
2 impacted. I don't want to go spend a lot of time
3 on this, or go into a lot of detail. I have a
4 feeling that will occur next, but we held a public
5 workshop in March, maybe the 21st, I can't
6 remember the exact date.

7 But there were a number of agencies and
8 entities there: U.S. Fish and Wildlife Service;
9 California Department of Fish and Game; the
10 California Coastal Commission; the California
11 Parks and Rec; the applicant and their consultant,
12 Dr. Huffman. And there were other parties, CAPE
13 was represented and the City was there.

14 At that meeting we discussed all of the
15 impacts and all these valuable species, the
16 endangered species, the sensitive habitats. And
17 we filled out a matrix and we came to some
18 determinations as to impact and the types of
19 compensation that would be used, one by one.

20 And essentially the agencies all agreed,
21 I do believe there was agreement in a number of
22 areas by Duke, and as brought up today, we've
23 identified some of those areas.

24 And in terms of the Morro shoulder-band
25 snail, which is federally endangered, and we've

1 talked about it a lot today. We do feel that the
2 snail, for example I'll start at Camp San Luis,
3 the snail was found at a number of locations
4 around the periphery and on the site. And one of
5 those was a debris pile. Another was just a anise
6 plant, which wasn't a spectacularly plant.

7 During our workshop discussions we
8 talked about the types of habitat that the snail
9 occupies. We found that there was very little
10 known, and we were surprised to find it at Camp
11 San Luis; we were surprised to find it at the
12 satellite parking area. There were other people
13 very surprised to find it at CalPoly San Luis
14 Obispo.

15 Shows how little we know about this
16 species. We know very little about its range. We
17 don't know what it does during the summer, during
18 the fall, during the night, during the day.
19 Protocol surveys called for five surveys during
20 breeding times, which only two or three have been
21 conducted, due to the lateness of the find and the
22 weather.

23 So, there are unsubstantiated -- in
24 other words, in order to prove that they're not
25 occupying certain areas, five individual surveys

1 are required. And so we don't have that, and so
2 we're, as you are, using some judgment.

3 We also realize that these snails can
4 move up and across areas. And that since they've
5 gone to a debris pile, we think the laydown area
6 essentially would be, to a snail, a large debris
7 pile.

8 There are all kinds of equipment and
9 pieces of -- items of things that will be there
10 for years. Underneath them will be shaded; could
11 be damp; could, you know, a lot of times under
12 large things like that there's small depression.
13 You end up with water puddles and things like
14 that.

15 So, we think that those are a great
16 chance that snails will use that area and be
17 subject to losses, due to movement in and out of
18 equipment and storage, you know, whatever,
19 construction materials.

20 Also, at the satellite parking area it's
21 a little different situation. That's going to be
22 cars coming in and out. If the snails venture up
23 onto the parking, the gravel area at all, they're
24 very subject to being crushed and run over by
25 vehicles.

1 So, we haven't even proposed anything
2 for the satellite area, because that find is quite
3 recent. It was since or right at the time the FSA
4 was published.

5 We did come to some decisions amongst
6 the agencies, at least, and probably the other
7 parties, other than Duke, at a workshop about Camp
8 San Luis, and what that was was that, and I recall
9 Mr. Ellison saying, if it's a permanent impact
10 we'll mitigate at a four-to-one ratio. If it's
11 temporary, we'll mitigate at a two-to-one ratio.

12 And later --

13 MR. ELLISON: I'm going to object at
14 this point because two things. One, this is
15 supposed to be a summary of the direct testimony
16 and an awful lot of what we're hearing does not
17 appear in the direct testimony.

18 Secondly, with respect to
19 characterizations of what people said at the
20 workshop, or who was there and who agreed to what
21 or didn't agree, people's testimony is the best
22 evidence that you have before you about the
23 parties positions at this time.

24 I'm not saying -- I frankly don't know
25 what you're referring to. I'd have to go back and

1 look at the record on this workshop as to what was
2 said and wasn't said.

3 But, just generically, even if you're
4 right, I think that it's not appropriate to be
5 testifying to new stuff about what people said in
6 a workshop as if somehow that can be brought in
7 here to impeach people's testimony as to what's
8 acceptable and not acceptable.

9 MS. HOLMES: I don't think the intent
10 was to impeach. It's simply to summarize how
11 staff reached the conclusions that it did reach
12 about the appropriate --

13 HEARING OFFICER FAY: Okay, and it's a
14 question of degree. Mr. Anderson, try to avoid
15 repeating items that people stated at the
16 workshop. Obviously everything has to be
17 delivered on the record, and by the best source,
18 not a hearsay source.

19 So, the objection is sustained to that
20 extent. And if you -- I'll give you a little
21 leeway to go beyond your direct testimony if, you
22 know, you're just bringing us up to date. But try
23 to keep it to your direct testimony.

24 MR. ANDERSON: At that meeting we
25 decided to mitigate for a permanent loss at four-

1 to-one ratio for the snail at Camp San Luis, and
2 two-to-one for temporary loss.

3 The reason we even discussed permanent
4 loss was initially the site was going to be
5 permanently modified.

6 After the discussion about mitigating
7 for the loss of snail habitat, it was determined
8 that the site would be temporarily, only
9 temporarily modified. After three or however many
10 years that was needed, it would be returned to its
11 current position. The gravel would be removed.

12 We then reduced that to a 1.5-to-1
13 ratio. And that mitigation also included
14 mitigation for the California red-legged frog,
15 which because of the two creeks that have been
16 discussed previously, that run by the sides of the
17 laydown area, the frogs disperse into upland
18 areas, and they could go anywhere. It's really
19 difficult to predict. But they certainly could
20 cross those sites.

21 I'll leave the snail at Camp San Luis
22 and we'll pick up the snail at the power plant
23 site. During surveys, recent surveys late last
24 year and early this year, the California Parks and
25 Rec biologist found Morro shoulder-band snails at

1 the state park very close to the access road,
2 within 10, 15 feet of the corner of Embarcadero
3 where the access road goes south and across Morro
4 Creek. And as was mentioned earlier, it's
5 approximately .9 of a mile from the power plant
6 site.

7 This was a discovery that was a little
8 bit surprising, because people in general hadn't
9 thought that those snails still existed north of
10 the power plant. Part of it may be that people
11 didn't look correctly, or they didn't look very
12 much.

13 Nevertheless, they were there. And they
14 were -- in that particular location they were
15 using iceplant, which is a nice, physically is a
16 nice shrub; the area beneath it can retain
17 moisture and shading. Essentially structurally
18 would probably be similar to some of the other
19 types of shrubs that the snail would use in native
20 dune habitat.

21 Onsite, during their protocol surveys a
22 year or two ago, there were -- and I'll say that,
23 that first discovery they found 18 shells, of
24 which one was alive, 17 were dead. It's not
25 unusual to find nonliving, or shells. Some of

1 those can be aged, and I believe that the shells
2 that were found on the power plant site, two
3 things.

4 One, they appeared to be old; I think I
5 remember Dr. Huffman saying that. The other is
6 they were on the opposite side of the industrial
7 site or the power plant site from where
8 construction is going to occur.

9 They also were found, which some of
10 them, the near vegetation where they were found
11 was iceplant.

12 So, there was a lot of discussion about
13 habitat and what would act as potential habitat or
14 habitat that was suitable for these species. We
15 determined that iceplant was suitable habitat.
16 That snail told us that.

17 So, we looked at the power plant site.
18 There's going to be three acres removed. Those
19 acres had not, the snail had not been found in
20 those acres, in those iceplant acres. But we felt
21 it could be there, could have been there in the
22 past and it could be there in the future.

23 And for this area, Fish and Game, for
24 example, would require three-to-one ratio, plus a
25 one-to-one ratio for loss of habitat with

1 important species in it. The one-to-one is for
2 restoration purposes. The three-to-one is for
3 acquisition.

4 Well, we considered this degraded,
5 fairly low quality habitat. But having a strong
6 potential for the snail.

7 So our mitigation for those three acres
8 was at .5 acres to 1, which ended up being 1.5
9 acres.

10 The snails in the area are occurring in
11 a dune type situation which the power plant
12 probably was historically. So we used the dune
13 acres cost in that determination of compensation
14 amount.

15 There's been some discussion about the
16 dune habitat being sensitive habitat. The road
17 that occurs currently is a dirt road. When we
18 first came down here when we first received the
19 AFC, the road was narrower and it was more rutted,
20 and it hadn't been maintained for, according to
21 the City, five years previous to the last two
22 years.

23 Nevertheless, we felt that that road is
24 going to be paved. It will be used by cars. They
25 can't cross the bridge after the project, but they

1 can drive up to the bridge and park. Plus it will
2 be used for pedestrian and bicycle path.

3 We felt that that habitat that was
4 occupied that would be paved over .77 acres.
5 Also, should be mitigated for loss of dune
6 habitat. And there are a variety of species that
7 are associated with dune habitats that sensitive.

8 Again, we decided to mitigate at a very
9 low ration, .5-to-1, since it was being used as a
10 dirt road.

11 The access point to the power plant, I
12 don't know if you recall on the map, but there's
13 .3 acres that has grass growing on it. But
14 essentially it's dune habitat. Everything around
15 it is, dune habitat comes right down to it. But
16 it's degraded. It doesn't have dune vegetation
17 growing anymore. It has grass growing on it.

18 And I believe that Duke did the best job
19 they could in finding the most degraded spot to
20 bring the road in, other than bringing it in where
21 it currently is already paved.

22 In that area we also mitigated a low
23 ratio, .5-to-1 acre. The widening of the road,
24 .33 acres, is existing fairly high quality dune
25 habitat. That, in discussion with the other

1 agencies, especially with Fish and Game, we ended
2 up with a Fish and Game formula, 3-to-1, plus 1-
3 to-1 for restoration. There's a different cost
4 for restoration, it's less than the purchase of an
5 acre of dune habitat.

6 We ended up with about, I believe it was
7 4.5 acres of dune habitat. It's expensive
8 habitat. So, there was a cost there that I think
9 Duke is concerned about.

10 Western snowy plover has been
11 identified, been discussed a bit today. Duke has
12 agreed to the mitigation. There's still been
13 quite a bit of discussion. The paving of the
14 road, including bicycle path and pedestrian path,
15 and a bridge where there previously was no bridge,
16 we believe will increase human activity. And I
17 think essentially that's what it's for.

18 And so that the number of species that
19 are associated with dune habitat, in addition to
20 the sensitiveness of the dune habitat, itself,
21 will receive increasing human pressure. And so
22 we've asked that there be fencing along the roads,
23 and there will be signs, also, to keep people
24 from -- to keep automobiles from leaving the road
25 and keep people from going haphazardly through the

1 dune habitat.

2 Both south and north of Morro Creek.

3 There's some riparian habitat on site that is
4 currently in an ESHA, environmental sensitive
5 area. Currently the habitat, the current habitat
6 borders, is right up, you know, against where the
7 tank farm is. There's not that much activity at
8 the tank farm. They're not used.

9 The new power plant would be right there
10 where the tank is, so there'd be a lot of human
11 activity, lights, noise, things going on there
12 that currently are quite a bit, you know, are
13 several hundred yards away where the existing
14 power plant is.

15 For that, again, Duke has agreed to pay
16 the compensation, but we've estimated an area that
17 would be impacted by the power plant in terms of
18 breeding birds not hearing each other, and a
19 number of things.

20 And Duke came back to us with what they
21 felt was the appropriate acreage. They didn't
22 necessarily agree that that acreage should be
23 mitigated, but they came in with a lower number,
24 and we agreed to that number, which is, I believe,
25 2.71 acres of riparian.

1 And since this was just a -- wasn't
2 being chopped down or pulled out, it was being
3 affected in an indirect manner, we mitigated at a
4 low ratio of .5-to-1, also. Which ended up 1.35
5 acres of riparian habitat. Which maybe that was
6 \$14,000 or something, I can't remember what it
7 was.

8 Those are briefly a run-down of the most
9 important species and the types of impacts and how
10 we've dealt with them in mitigation.

11 I think that's all I have to say right
12 now.

13 HEARING OFFICER FAY: Ms. Holmes, did
14 you want to move the staff testimony?

15 MS. HOLMES: You took the words right
16 out of my mouth. Yes. I move that the
17 terrestrial biology portions of the two exhibits
18 be admitted at this time.

19 HEARING OFFICER FAY: Okay. I think we
20 need to mark the FSA part three as an exhibit.

21 MS. HOLMES: No, I believe we already
22 did. I believe that was 197.

23 HEARING OFFICER FAY: 197? Thank you.
24 Okay, so these are the terrestrial portions of
25 exhibit 197 --

1 MS. HOLMES: 198.

2 HEARING OFFICER FAY: -- and 198 is the
3 rebuttal testimony?

4 MS. HOLMES: Yes.

5 HEARING OFFICER FAY: Any objection to
6 receiving that? All right, so moved.

7 Are the witnesses available for cross-
8 examination?

9 MS. HOLMES: They are.

10 HEARING OFFICER FAY: Okay. Mr.
11 Ellison.

12 CROSS-EXAMINATION

13 BY MR. ELLISON:

14 Q Mr. Anderson, let me begin by asking you
15 to turn to page 3-2 of exhibit 197.

16 MR. ANDERSON: 3-2?

17 MR. ELLISON: Right. The second bullet
18 there, there's a discussion of the Warren Alquist
19 Act section 25527 that describes it as mandating
20 that certain areas such as estuaries, state parks
21 and wilderness and scenic are natural preserves,
22 areas for wildlife protection, are prohibited for
23 installation of industrial facilities. Do you see
24 that?

25 MR. ANDERSON: Yes.

1 MR. ELLISON: Is that your understanding
2 of the exact language of that code section?

3 MR. ANDERSON: I think Caryn is looking.
4 I would say I would have to look, also, if it's
5 possible to paraphrase, but it could be word-for-
6 word.

7 MR. ELLISON: I have copies; I'd be
8 happy to distribute that.

9 MS. HOLMES: He has a copy of it.

10 MR. ANDERSON: It identifies state,
11 region, county and city parks, wilderness, scenic
12 or natural reserves, areas for wildlife
13 protection, recreation, historic preservation or
14 natural preservation areas in existence on the
15 effect date of this division. Is that what you
16 were referring to?

17 MR. ELLISON: I think the relevant one
18 are estuaries, right?

19 MR. ANDERSON: Estuary -- B is estuaries
20 in an essentially natural and undeveloped state.
21 I wasn't aware we were discussing estuaries today,
22 but --

23 MR. ELLISON: Well, let me ask this. Is
24 the relevance of this in this testimony estuaries?

25 MR. ANDERSON: Well, state parks fits

1 what we're talking about as terrestrial on the
2 corner.

3 MR. ELLISON: This project is not being
4 located in a state park, is it?

5 MR. ANDERSON: It's adjacent to it, and
6 some of the -- at the very corner is adjacent to
7 state park, the corner where you turn off highway
8 41 and go south to down the Embarcadero, which
9 will be a construction access route.

10 MR. ELLISON: Let me ask this question.
11 What is the relevance, in your view, of this code
12 section to this power plant?

13 MR. ANDERSON: The most important
14 relevance is that this LORS section was used in
15 both the aquatic and the terrestrial. And so it's
16 more relevant to the estuary because it's a
17 natural estuary. The outfall is in a state park,
18 Morro Rock is an ecological preserve under the
19 state park code.

20 So that's the main reason it's in here.
21 It was just simply we cut and pasted the LORS
22 section for both, by and large, for both the
23 aquatic and the terrestrial section.

24 MR. ELLISON: Is it your opinion, as it
25 appears to be stated here, that the Commission

1 cannot license this project because of this code
2 section?

3 MR. ANDERSON: No. I don't really have
4 an opinion on this. I just know that it
5 identifies areas for wildlife protection, and that
6 could be an ESHA, for example, such as your
7 riparian area. Could be the dune habitat, which
8 is also considered environmentally sensitive area.

9 It's quite broad, and I would let Caryn
10 answer questions as to what it actually means in
11 terms of licensing the power plant.

12 MR. ELLISON: Well, you testified as to
13 conformance with applicable LORS, and this is one
14 of the LORS that you've listed.

15 Let me just ask this, if you look at
16 25527, although you've characterized it as
17 prohibiting installation of industrial facilities,
18 isn't it more accurate to say that it imposes
19 certain conditions? I'm looking at the first
20 paragraph under which siting in these areas can
21 occur.

22 And I'm referring specifically to the
23 phrase, "Unless the Commission finds that such use
24 is not inconsistent with the primary uses of such
25 lands", et cetera.

1 MR. ANDERSON: Yes.

2 MR. ELLISON: And although perhaps we'll
3 get into this when we get to marine, let me just
4 ask you, is it your opinion that the Morro Bay
5 Estuary is in an essentially natural and
6 undeveloped state?

7 MR. ANDERSON: Difficult to answer what
8 essentially means. It has aspects of naturalness.
9 It's been degraded. It's got a lot going for it,
10 that's why it's valuable, that's why it's
11 protected. That's why there's a lot of focus on
12 improving it.

13 But there are effects to it coming from
14 a number of directions, not only the power plant,
15 of course.

16 MR. ELLISON: But you do acknowledge
17 there is an existing power plant, along with the
18 City and all the other impacts that you've
19 testified to, both here and in marine, right?

20 MR. ANDERSON: Yes, there is an existing
21 power plant.

22 MR. ELLISON: And the Central Coast
23 Regional Water Quality Control Board has
24 designated the estuary as -- and I may be using
25 the wrong exact word here, but degraded, or

1 something to that effect, correct?

2 MR. ANDERSON: They have placed it on
3 the impaired water body list, which is section
4 303(d) under the Clean Water Act, which focuses a
5 lot of attention on reducing the degradations, of
6 which they list three. One of which is siltation.
7 And so there is a focus on improving it.

8 MR. ELLISON: Okay, well, maybe we can
9 dispense with this more quickly if I just jump to
10 the bottom line here.

11 MR. ANDERSON: Okay.

12 MR. ELLISON: In your opinion does the
13 Morro Bay project conform with this code section?

14 MR. ANDERSON: I'm not sure that I can
15 answer that, because I think it may be a legal
16 question. When I look at it, it seems to me that
17 it's inconsistent. But we haven't discussed it in
18 a lot of detail. We haven't analyzed the project
19 in terms of the terrestrial part of the project,
20 at least in terms of this code, or this section.

21 MR. ELLISON: Okay, well, I am confining
22 my questions to terrestrial biology.

23 MR. ANDERSON: Okay. I'd say where it
24 lists state parks is very relevant.

25 MR. ELLISON: Well, one of the purposes

1 of your testimony is to review whether the project
2 complies with applicable laws, correct?

3 MR. ANDERSON: Yes.

4 MR. ELLISON: And you've listed this as
5 an applicable law, correct?

6 MR. ANDERSON: Yes.

7 MR. ELLISON: What is your finding with
8 regard to the project's conformance with this law?

9 MR. ANDERSON: It seems to be
10 inconsistent.

11 MR. ELLISON: In what way is it
12 inconsistent?

13 MR. ANDERSON: Well, it's affecting a
14 state park. I think that several parts of the
15 national estuary, for example, and the state
16 estuary would be considered natural areas.

17 MR. ELLISON: And it's your reading of
18 this law that anything that affects a state park
19 is in violation of this law? And I would remind
20 you again to look at the provision that says,
21 unless the Commission finds that such use is not
22 inconsistent with the primary uses of such lands,
23 and there be no substantial adverse environmental
24 effects, and that the approval of the public
25 agency having ownership or control of such land is

1 obtained.

2 MR. ANDERSON: Well, I'm pretty sure
3 that decision obviously is up to the Commission.

4 MR. ELLISON: Okay, well, let's just
5 leave it at that.

6 With regard to -- let me start with some
7 questions about the environmental baseline here.
8 There are a number of places in your terrestrial
9 biology testimony where you refer to the creation
10 of an access road.

11 Is it your understanding that there are
12 any new roads being created for this project?

13 MR. ANDERSON: Yeah, the access portion
14 that goes into the power plant site doesn't exist
15 today. That's the one that's discussed about we
16 have the dune habitat versus only grassland
17 dispute.

18 MR. ELLISON: Okay, but other than that
19 relatively small section, the roads that we're
20 talking about exist today, correct?

21 MR. ANDERSON: They exist, but not as
22 they would be with the proposed project. They're
23 not as -- they will be if the proposed project is
24 approved. They're dirt now; they'll be paved.

25 MR. ELLISON: Let me be more specific.

1 The extension of the Embarcadero Road south of the
2 proposed bridge, there's a dirt road that will be
3 paved, correct?

4 MR. ANDERSON: Yes.

5 MR. ELLISON: And the construction north
6 of the bridge is already paved, correct?

7 MR. ANDERSON: Yes.

8 MR. ELLISON: Okay. The dirt road south
9 of the proposed bridge, what's your understanding
10 of how long that's been in existence?

11 MR. ANDERSON: I don't know, but I did
12 notice it wasn't done. If you want to put the
13 City zoning map back up, the one that was being
14 viewed here, didn't show the one of dirt; it
15 showed the one on the north side, but it didn't
16 show that one.

17 So, I don't know for sure. I think it's
18 been a track or a trail across the dunes that cars
19 just drove in and parked over time. And I think
20 that's probably, it's been as long as the last two
21 years when I've been coming down here periodically
22 for this project. And I'm sure before that. But
23 I don't know how long.

24 MR. ELLISON: Is there any plan to close
25 the road that you know of?

1 MR. ANDERSON: No.

2 MR. ELLISON: If this project is built,
3 will cars be able to go anywhere in the future
4 that they cannot go today?

5 MR. ANDERSON: I don't believe so. They
6 will not be able to cross over the bridge, if
7 that's what you mean.

8 MR. ELLISON: And with respect to again
9 the environmental baseline, let me focus your
10 attention on the other side of the bridge, on the
11 north side of the bridge, and the impacts on the
12 area near the intersection of Atascadero Road and
13 North Embarcadero.

14 There is no fencing there now, correct?

15 MR. ANDERSON: There's what? No
16 parking?

17 MR. ELLISON: There's no fencing there
18 now?

19 MR. ANDERSON: There's no fencing there,
20 no.

21 MR. ELLISON: And that is available to
22 public access, correct?

23 MR. ANDERSON: Yes.

24 MR. ELLISON: And there's an RV park
25 across the street, correct?

1 MR. ANDERSON: Down south a ways from
2 the corner there is an RV park, yes.

3 MR. ELLISON: And there's a state park
4 there that would attract visitors, correct?

5 MR. ANDERSON: Yes, north of that
6 corner.

7 MR. ELLISON: So is it fair to say that
8 there is good public access as well as an
9 attractive beach and state park already there?

10 MR. ANDERSON: Yes.

11 MR. ELLISON: Let me get a picture of
12 this road up on the screen, if you can do that,
13 Peter.

14 (Pause.)

15 MR. ELLISON: Okay, does that look like
16 the road we're talking about, the unpaved road?

17 MR. ANDERSON: It's hard for me to tell
18 if it's the exact road because I'm not that
19 familiar with it. But it's something similar.

20 MR. ELLISON: Will you accept, subject
21 to check, that this is a picture of the road we're
22 talking about?

23 (Laughter.)

24 MR. ANDERSON: I don't know, is this a
25 trick?

1 (Laughter.)

2 MR. ELLISON: If you want I can sponsor
3 the witness who took the picture, but I'd like
4 to --

5 MR. ANDERSON: Okay, well, I believe you
6 then.

7 MR. ELLISON: All right. My
8 understanding is that this is taken looking south,
9 so the power plant would be to the left and there
10 would be the dunes to the right, and the City of
11 Morro Bay would be further in the distance. Does
12 that help orient the view?

13 MR. ANDERSON: Yes.

14 MR. ELLISON: Okay. Now, the City
15 maintains this road, you testified to that
16 already, correct?

17 MR. ANDERSON: Well, I remember
18 somebody, a representative of the City saying that
19 the last two years they've had a budget, and they
20 have been grading this road. The previous five
21 years they didn't touch it because of budget.

22 MR. ELLISON: But as of the last two
23 years they've maintained the road, that's what
24 you --

25 MR. ANDERSON: I recall that.

1 MR. ELLISON: And is it also your
2 understanding that they intend to continue to
3 maintain the road?

4 MR. ANDERSON: They have said that.

5 MR. ELLISON: Okay. And the impact
6 we're talking about is the paving of this road, is
7 that correct?

8 MR. ANDERSON: Yes.

9 MR. ELLISON: Now, would the entire
10 width of what you see here as road be paved?

11 MR. ANDERSON: I'm assuming most of it
12 will because there's -- you haven't disagreed with
13 the fact that .33 acres will be lost by widening
14 this for paving.

15 MR. ELLISON: Okay. This is the
16 degraded dune scrub habitat that is described. On
17 page 3-15 of your testimony, table 2, this is the
18 degraded dune scrub habitat that is the .77 acres,
19 correct?

20 MR. ANDERSON: Yes. And this is tables
21 from Duke's AFC. We've included it here.

22 MR. ELLISON: Okay. But this road
23 constitutes .77 acres of the 1.1 acres of dune
24 scrub -- well, both dune scrub and potential
25 grassland that is in dispute here between Duke and

1 staff as to whether there should be money paid for
2 compensation for the paving of this road, correct?

3 MR. ANDERSON: Yes, it is.

4 MR. ELLISON: Now, immediately to the
5 west of this, what you characterize as this
6 degraded dune scrub habitat, is what I believe you
7 characterized as much better quality dune habitat,
8 is that correct?

9 MR. ANDERSON: I'm not aware of
10 characterizing the dune habitat to the right of
11 the road or the west of the road as degraded.

12 MR. ELLISON: No, I didn't mean to say
13 that you characterized it as degraded. I thought
14 what you characterized it as, as being of better
15 quality than the road.

16 MR. ANDERSON: Yes.

17 MR. ELLISON: Okay. Do we have a
18 picture of that habitat, as well? On the east
19 side. Well, you can probably see enough of it
20 from here. All right, let's take a look at the
21 other picture now, if we've got one. This is
22 more, this is looking towards the power plant,
23 this is more what the dune scrub habitat looks
24 like on each side of the road, is that generally a
25 fair statement?

1 MR. ANDERSON: What it looks like on
2 each side of the road, did you say? or the east?

3 MR. ELLISON: On each, generally, both
4 sides.

5 MR. ANDERSON: Both sides. In some
6 areas it looks like this; and in some areas it
7 looks better.

8 MR. ELLISON: Okay. Now, what I'd like
9 to do is ask you to refer to page 3-33 of your
10 testimony. There, in the first paragraph, under
11 staff's proposed mitigation for impacts to dune
12 scrub habitat you discuss Duke's proposal to
13 mitigate for the new access road across the .33
14 acres that we all agree needs to be compensated
15 for.

16 Duke had originally proposed to
17 compensate for that by doing dune restoration to
18 the west of the road. Now, this picture, I
19 emphasize, is probably to the east of the road.
20 But, why don't we go back to the picture of the
21 road.

22 To do dune restoration and a
23 conservation easement on the dunes to the west of
24 the road. So the question is, isn't that correct,
25 that Duke had proposed as mitigation, rather than

1 paying money to do restoration and conservation
2 easement on, I believe it was four acres, roughly
3 four acres to the west of this road, correct?

4 MR. ANDERSON: My recollection is that
5 this is what's called the Den Dulk property, is
6 that correct?

7 MR. ELLISON: That's correct.

8 MR. ANDERSON: Duke proposed protecting
9 and restoring one acre of that approximately four
10 acres. And the other three acres I believe you
11 were going to try to keep the weeds out of. But
12 it was a lesser degree. But, yes, you did propose
13 this as a conservation plan.

14 MR. ELLISON: And also to put it under a
15 conservation easement, to put that entire
16 property. And I may be incorrect, it may be that
17 most of this was on the east side of the road, but
18 it's the same kind of dune habitat.

19 My point is it was immediately adjacent
20 essentially to this road, correct.

21 MR. ANDERSON: I believe it was adjacent
22 to the road and adjacent to the power plant, which
23 would put it on the east side of the road.

24 MR. ELLISON: Okay. In any case, that
25 other picture we were looking at is exactly what

1 we're talking about.

2 In this paragraph, first paragraph on
3 page 3-33, you describe many reasons for rejecting
4 that proposal, is that correct?

5 MR. ANDERSON: I think so. I could
6 restate them, if you'd like.

7 MR. ELLISON: Well, I'm just looking at
8 what's right here. What you say is that this
9 plan's proposed mitigation area is an insular,
10 one-acre patch of land surrounded by roads and
11 power plant, surrounding 2.57 acre weed removal
12 area does little to add to the quality, size and
13 connectivity to the small area.

14 The dune scrub vegetative community is a
15 valuable habitat that meets foraging and nesting
16 and dispersal needs of many wildlife species. If
17 a proposed mitigation designed to replace this
18 specific habitat cannot function as habitat, then
19 that mitigation is unacceptable.

20 My question is isn't what you state here
21 about this dune scrub equally applicable to the
22 road? If this is not good habitat to function as
23 mitigation, isn't that also true that the road,
24 which is much more degraded than this, is not good
25 habitat, either?

1 MR. ANDERSON: Yeah, we would never
2 consider the road as a conservation easement for
3 mitigation. You know, the answer is, yes, the
4 road is -- this is somewhat disturbed and degraded
5 dune habitat. And the road is more disturbed.
6 Both of these places may be able to come back to
7 some semblance of higher quality dune habitat if
8 restored or if left alone. A lot of human
9 activity here.

10 MR. ELLISON: To be clear, your position
11 is that the road is sufficiently good habitat to
12 require compensation --

13 MR. ANDERSON: We have --

14 MR. ELLISON: Let me finish my question.

15 MR. ANDERSON: Sorry.

16 MR. ELLISON: -- but this habitat which
17 you've acknowledged as better, is not sufficiently
18 good habitat to serve as mitigation, is that a
19 fair statement of your position?

20 MR. ANDERSON: I think so. That was
21 kind of a long question. Could I expand on this a
22 little?

23 We're not proposing the road as a
24 mitigation measure or as a conservation easement.
25 We're proposing that it's a loss of degraded

1 habitat that's being mitigated, not four-to-one,
2 but at .5-to-1, very low.

3 This particular area was not felt to be
4 adequate for mitigating for the loss of dune
5 habitat because it is surrounded by activity. On
6 one side the power plant, the other side the road
7 that will be paved.

8 It's a small area; it's rather isolated
9 from the rest of the beach and the rest of the
10 dune habitat. At the same time we prefer to do
11 the best we can with compensation or with
12 mitigation, and there are a number of projects in
13 the vicinity that are undergoing restoration and
14 stuff like that, that are parts of larger areas
15 that fit into a regional conservation plan.

16 And we felt that contributing or
17 participating in that type of an activity, such as
18 State Parks is doing with their restoration effort
19 just north of the power plant, where the dune
20 snail actually has been found, which we felt was
21 valuable, too. That there were better choices
22 than one acre here, in considering the location
23 that it's in.

24 That was the reason for rejecting this
25 as mitigation for the dune habitat impact.

1 MR. ELLISON: Does that complete your
2 answer?

3 MR. ANDERSON: Yeah.

4 (Laughter.)

5 MR. ELLISON: Isn't there some
6 relationship between the quality of the habitat
7 that is lost and the amount of mitigation that is
8 required?

9 MR. ANDERSON: It's been argued that
10 there shouldn't be, because degraded habitat can
11 become high quality habitat if left alone or if
12 restored and be valuable to the species.

13 But I look at it both ways sometimes,
14 and in this case we decided to -- and other
15 agencies were involved in this decision -- to
16 mitigate at a very low level because of the
17 arguments Duke was making, and the fact that it is
18 degraded.

19 MR. ELLISON: Let me ask you a different
20 set of questions. Earlier, you know, we handed
21 out the appendix G CEQA significance criteria.
22 You probably still have a copy of that. Do you
23 still have that?

24 MR. ANDERSON: Yeah, yes.

25 MR. ELLISON: First of all, you are

1 requiring mitigation for the road pursuant to
2 CEQA, correct?

3 MR. ANDERSON: Requiring mitigation for
4 the loss, the permanent loss of dune habitat that
5 we feel could become dune habitat again if the
6 road -- once the road's paved, we feel it's gone
7 forever.

8 So it's for the dune habitat, and it's
9 for the species that occupy it. There are a
10 number of sensitive species that occupy dune
11 habitat that we haven't mentioned today, species
12 of special concern, such as Carol mentioned, the
13 butterfly.

14 MR. ELLISON: Are there any of those
15 species that occupy the road?

16 MR. ANDERSON: Possibly as a road-kill.

17 MR. ELLISON: Are there any of those
18 species that --

19 (Laughter.)

20 MR. ELLISON: Other than as road-kill,
21 are there any species that would occupy the road
22 as long as it's a road in its current state?

23 MR. ANDERSON: I don't think so. I
24 think they would scamper across it or do whatever
25 they could to get off it.

1 MR. ELLISON: Or in the case of a snail,
2 something different than scamper?

3 MR. ANDERSON: Right. Yeah.

4 (Laughter.)

5 MR. ELLISON: Is the paving of this road
6 going to have any significant impact on the
7 population of snails on the other side of the
8 Creek, .9 miles away?

9 MR. ANDERSON: Well, the way we looked
10 at it was once you have a very attractive
11 pedestrian and bicycle path there that can cross
12 the bridge and now connect north and south of
13 Morro Creek, which goes right down the Embarcadero
14 right into the nice restaurants and the beautiful
15 City of Morro Bay, that, yes, the traffic will
16 increase, human activity will increase, so there
17 will be a lot of construction traffic, big trucks
18 for three to five years or whatever, eight years
19 or however long it's going to take to remove the
20 existing power plant, as well as build the
21 proposed, and that this will increase the use of
22 the area. And that will result in impacts to
23 dune, beach -- or the dune habitat and species
24 occupying those habitats.

25 MR. ELLISON: Let me be clear. We can

1 have another conversation and there is other
2 mitigation for the impact to the snail at the
3 location of the snail, the impact of population at
4 the snail and all that sort of thing. We've got
5 fencing, we can talk all about that.

6 My question is more narrow. What I want
7 to focus on is the lost, allegedly degraded dune
8 scrub habitat that is represented by this road.
9 And my question is whether the paving of this road
10 is going to have any significant impact on the
11 snail, on the actual population of snails --

12 MR. ANDERSON: Are you talking --

13 MR. ELLISON: -- .9 of a mile away?

14 MR. ANDERSON: -- physically paving, or
15 adjacent habitat effects from increased activity
16 and vehicles and people?

17 MR. ELLISON: I'm talking about the
18 paving of this road.

19 MR. ANDERSON: Only if there were snails
20 that got graded over or paved over coming into it
21 from adjacent habitat.

22 MR. ELLISON: And is there any -- these
23 areas on each side has already been surveyed,
24 correct?

25 MR. ANDERSON: Yes, they have.

1 MR. ELLISON: And there was no snail
2 presence?

3 MR. ANDERSON: There was at the corner
4 of Embarcadero and highway 41.

5 MR. ELLISON: That's .9 of a mile away
6 on the other side of the Creek, correct?

7 MR. ANDERSON: That's on a construction
8 access road, adjacent to it. Are you just talking
9 about south of this --

10 MR. ELLISON: Yes, I'm just talking
11 about just south of the road.

12 MR. ANDERSON: There were no snails
13 detected in the adjacent habitat out 100 feet I
14 think is what Dr. Huffman said he surveyed.

15 MR. ELLISON: Okay, so let me re-ask my
16 questions because I'm just focusing on the paving
17 of the unpaved portion of the road south of the
18 Creek for which you've asked Duke to compensate
19 for .77 acres of degraded dune scrub.

20 And the question is will that paving
21 have any significant impact on the population of
22 snails .9 of a mile away across the Creek?

23 MR. ANDERSON: Well, not .9 of a mile,
24 but habitats, the correct habitat for the snail,
25 it's possible that there are some there even

1 though the surveys didn't pick them up. Those
2 surveys --

3 MR. ELLISON: I'm talking about the
4 road, I'm sorry to interrupt you, but I want to
5 clarify. I'm talking about the road, itself.

6 MR. ANDERSON: I am, too.

7 MR. ELLISON: Okay, so you're saying
8 that --

9 MR. ANDERSON: Things can crawl on the
10 road as it's being paved. And that would be -- I
11 don't think there are any snails living on the
12 road today. But there certainly could be in the
13 adjacent habitat, and they could venture across
14 the road.

15 So in your definition they would have to
16 be there at the exact time that I guess you're
17 putting blacktop down or whatever you're going to
18 be paving it with, in order to be impacted. But
19 then I'd say that that was a slim chance, but that
20 would be a chance.

21 MR. ELLISON: Okay, let me ask you this.
22 Under what legal authority are you requiring that
23 Duke compensate for the paving of this road?

24 MS. HOLMES: Are you asking him whether
25 he's talking about CEQA or LORS, since we've

1 already discussed the two general categories of
2 the analysis?

3 MR. ELLISON: Correct.

4 MS. HOLMES: Okay.

5 MR. ANDERSON: I guess it would be CEQA.

6 MR. ELLISON: Okay, --

7 MR. ANDERSON: My feeling is --

8 MR. ELLISON: CEQA?

9 MR. ANDERSON: Yeah.

10 MR. ELLISON: All right. Now, under
11 CEQA you have these significance criteria,
12 correct? Can you tell me which of each of these
13 criteria you're relying upon to require
14 compensation for the paving of the road?

15 MR. ANDERSON: Well, D talks about
16 interfere substantially with the movement of any
17 native resident or migratory fish or wildlife
18 species.

19 It's possible that snails would be
20 venturing across the road over time and get
21 crushed by car traffic. Legless lizards. There
22 could be some other things that are occurring here
23 that could be affected by the road.

24 MR. ELLISON: So your testimony is that
25 it's category D that you rely upon?

1 MR. ANDERSON: I'd say that there's
2 probably a couple of these. A might come in. My
3 feeling is that if this road wasn't maintained it
4 would revert to dune scrub habitat. Once it's
5 paved it's pretty much out of the question for at
6 least decades.

7 And I'm not sure that this road, as it
8 is today, has ever legally been proposed and
9 permitted. Probably not gone through any type of
10 CEQA review in the past, not that that matters
11 today.

12 And it has widened -- of course, this
13 picture makes it look pretty wide -- over the last
14 two years, from my memory.

15 MR. ELLISON: So you're assuming in
16 making your determination of significance that
17 this, if not paved, will revert to dune scrub
18 similar to what's on either side of it, is that
19 what you're saying?

20 MR. ANDERSON: If it was abandoned, left
21 alone, it would.

22 MR. ELLISON: Is there any evidence that
23 it will be abandoned or left alone?

24 MR. ANDERSON: I don't know, but not
25 that I know of.

1 MR. ELLISON: If you were to assume that
2 it's not abandoned and that the City continues to
3 maintain it, would that change your conclusion
4 regarding compensation for the road?

5 MR. ANDERSON: I think that when it's
6 paved it needs to go through some type of CEQA
7 review. And whether it's Duke or the City that is
8 going to ultimately pave it, I think there needs
9 to be some type of permit involved.

10 MR. ELLISON: That's not my -- we're
11 doing that right here. This is the CEQA review of
12 the paving of the road. The question is, if, in
13 doing that CEQA review, if you assume that but for
14 this project this would continue to be a
15 maintained road, but not paved, would that change
16 your conclusions regarding requiring compensation
17 for paving it?

18 MR. ANDERSON: If this was going to
19 continue to be an unpaved road instead of being
20 paved?

21 MR. ELLISON: Yes.

22 MR. ANDERSON: If it was going to
23 continue to be an unpaved road, I don't think we
24 would do anything about it.

25 MR. ELLISON: Okay. Now, let me ask you

1 about the requirement for compensation of the
2 iceplant on the power plant site, I believe it's
3 three acres.

4 And, again, let me ask you, that is also
5 being required under CEQA, correct?

6 MR. ANDERSON: Yes.

7 MR. ELLISON: And can you tell me which
8 of the significance criteria is the basis for that
9 requirement?

10 MR. ANDERSON: Well, A, for one, without
11 reading them all.

12 MR. ELLISON: Take your time. If you
13 want to read them all, read them all.

14 MR. ANDERSON: Well, let's start with A.

15 MR. ELLISON: Okay. A says that the
16 loss of -- it says, have a substantial adverse
17 effect, either directly with your habitat
18 modifications on any species, correct? And it
19 goes on.

20 MR. ANDERSON: Yeah.

21 MR. ELLISON: The impact has to be on
22 the species. Now maybe through a habitat
23 modification, but it does have to be on the
24 species, correct?

25 MR. ANDERSON: It says either directly

1 or through habitat modification.

2 MR. ELLISON: On any species. I'll ask
3 the question this way: You read this to say that
4 if I impact the habitat, but not the species, this
5 significance criteria -- there would not be a
6 finding of significance under this criteria,
7 correct?

8 MR. ANDERSON: I don't agree with your
9 statement -- or your question, I guess it was,
10 because if you're adversely affecting the habitat
11 of the species, you're also affecting that
12 species.

13 MR. ELLISON: So is it your opinion
14 that, this gets to -- any impact on habitat for
15 the species is an impact on the species, no matter
16 where that habitat is located?

17 MR. ANDERSON: If it's habitat that's
18 known, such as iceplant, which has just recently
19 been discovered as being used as habitat by the
20 snail, both on the power plant existing site and
21 .9 of a mile north during the California
22 Department of Parks and Recreation surveys, we
23 think that the iceplant is potential habitat that
24 could be occupied. But it's going to be removed
25 forever, because the power plant foot will be

1 sitting there.

2 And so that this habitat that may have
3 been occupied in the past, and may be occupied in
4 the future is lost.

5 MR. ELLISON: But do you agree that it's
6 not being occupied now?

7 MR. ANDERSON: I agree that during the
8 surveys that were done a year or two ago the
9 species was not detected. And I believe those
10 were protocol surveys.

11 MR. ELLISON: So let me ask the question
12 that Ms. Holmes was asking Dr. Huffman. Accepting
13 for the moment that we have to show that there's
14 an impact on the species through the loss of
15 habitat, that there has to be some nexus between
16 the habitat and an identified population?

17 MR. ANDERSON: I don't believe that.

18 MR. ELLISON: You do not believe that?

19 MR. ANDERSON: You said between that and
20 identified population. We're talking about
21 individuals, I think, for one.

22 MR. ELLISON: Let me ask this, do you
23 believe then that there is no distance limitation?
24 That any habitat of the Morro shoulder-band dune
25 snail, no matter how far away, it has to be

1 compensated for?

2 MR. ANDERSON: No.

3 MR. ELLISON: Okay. Then how do you
4 decide how far away is too far?

5 MR. ANDERSON: Well, what we did is we
6 looked at the fact that there were quite a few
7 snails and snail shells found in the state park
8 north. It just happened that only, you know, like
9 I said, a few were found right on that corner.
10 But I would say that those are part of a
11 continuous population that goes north some
12 distance. I'm not sure how far. It's not very
13 far from the power plant.

14 You're using the figure .9 of a mile, so
15 I believe that figure is right. We've used it,
16 ourselves. There also was shells found on the
17 power plant site in association with iceplant.
18 And that leads us to believe that this is occupy-
19 able and suitable habitat. It's just that we
20 hadn't known it; we were looking for -- people
21 have a tendency to look at native species in
22 native situations, and we're finding that both at
23 Camp San Luis and in the vicinity of the power
24 plant that other types of habitat are being used,
25 which we need to consider as suitable habitat.

1 MR. ELLISON: You understand that Duke
2 has agreed to have biological monitoring on this
3 particular piece of property, and that all we're
4 talking about here is whether Duke also needs to
5 compensate for the taking of that habitat,
6 correct?

7 MR. ANDERSON: You're talking about the
8 three acres of iceplant --

9 MR. ELLISON: Three acres of iceplant,
10 that's right.

11 MR. ANDERSON: I think I agree with
12 that.

13 MR. ELLISON: Okay. Now, with respect
14 to those three acres of iceplant, do you consider
15 them to be within the range of the snails at .9 of
16 a mile away at Atascadero Road and North
17 Embarcadero?

18 MR. ANDERSON: Absolutely.

19 MR. ELLISON: So you would expect those
20 snails to travel that .9 of a mile across the
21 Creek and use this iceplant?

22 MR. ANDERSON: Well, maybe you're not
23 defining range the way I'm thinking of range, but
24 for my purposes the range of the snail occurs way
25 south of the power plant to way north of it.

1 We may not be talking -- you may be
2 thinking about one snail and how much area does it
3 cover during its lifetime on an annual or a daily
4 basis. But when we talk about species' range, we
5 often talk about where it currently exists. And
6 we know now that it exists all the way out to San
7 Luis Obispo. We don't know that it exists outside
8 of the Morro Creek basin or watershed. But it
9 does occur down by Los Osos and north of the power
10 plant. So it would make sense, yes, the power
11 plant would be in the range.

12 MR. ELLISON: I want to see if I can --
13 I just want the record to be clear what the
14 difference is here. I'm not trying to berate
15 anybody.

16 What I understand the difference between
17 Duke and staff to be is essentially this: That
18 Duke believes that you have to show, in order to
19 require compensation, that you have to show that
20 there's a substantial impact on the identified
21 species. This is what Mr. Huffman described as
22 occupied habitat.

23 Now, I want to be clear, I'm not
24 discussing what he described as protected habitat,
25 which is an entirely different discussion.

1 Well, let's clarify that. Is the
2 iceplant in any way designated as requiring
3 protection other than pursuant to CEQA?

4 MR. ANDERSON: Currently, no. But this
5 is new information about the snail. I wouldn't
6 doubt but what iceplant in certain locations would
7 be considered as suitable habitat in the future.

8 MR. ELLISON: But as we speak today, the
9 answer would be no?

10 MR. ANDERSON: It's not been designated
11 such by the U.S. Fish and Wildlife Service.

12 MR. ELLISON: Okay, so the issue is
13 CEQA. And let me see again, having separated out
14 protected habitat, let me see if I can
15 characterize the difference and see if you at
16 least agree that that's what the difference
17 between the parties is.

18 Duke believes, under CEQA, and you've
19 pointed to A as the significance criteria in
20 question here, Duke believes that this says you
21 have to show an impact on the species. Now, it
22 can occur through habitat, but you have to show an
23 impact on the species. And that that showing has
24 not been made.

25 What I understand you to be saying is

1 that if the habitat is potentially occupy-able,
2 and within the range, and by range you meaning not
3 the range of any identified populations, but just
4 the range of the larger geographic area in which
5 they are found, that that, in and of itself, is an
6 impact. Is that what you're saying?

7 MR. ANDERSON: Yeah, if we look at the
8 federal and the state Endangered Species Act, the
9 definition of take is not just killing the
10 individual species, but it's disturbing their
11 habitat also.

12 If there's a species occurring on that
13 habitat when it's disturbed, then that's a direct
14 take of the species.

15 But, habitat could be user, as occupied.
16 I mean we don't know enough about these species'
17 life history to understand how far they travel or
18 when they travel, what they do during the year, at
19 different times of the year.

20 If we were dealing with kit fox we would
21 look at miles of habitat where there might only be
22 a couple dens, where you might say this is
23 occupied, this den, but the whole place is
24 habitat. And it gets dealt with in our projects
25 as occupy-able habitat that's lost, lost forever,

1 or lost for decades.

2 We're looking at this in the same way.

3 PRESIDING MEMBER KEESE: Counsel, may I
4 interrupt for a second?

5 MR. ELLISON: Yes.

6 PRESIDING MEMBER KEESE: To just observe
7 for staff that I'm having difficulty reconciling
8 the requirement for a substantial adverse effect,
9 or with the observation that there's a potential
10 that they exist there.

11 Substantial adverse effect sounds
12 rather -- it's an occurrence. Potential that they
13 may be there doesn't sound like you're ever going
14 to meet and get to the level of substantial
15 adverse effect.

16 There's a potential someone might be
17 walking across the street some night and get hit
18 by a car, but which would be a substantial
19 negative impact.

20 Do you follow me? I want to reach the
21 threshold of substantial adverse effect. I don't
22 think potential gets me there. I'm having trouble
23 with that.

24 Sorry to interrupt, but I --

25 MR. ANDERSON: Quite okay. We're

1 dealing with a federally endangered species.

2 Anything that affects it or its habitat would be
3 considered a significant impact under CEQA. And
4 substantial adverse impact would be the same. I'd
5 say anything that affects the species habitat.

6 We consider the iceplant to be habitat.
7 The species hasn't been seen in that particular
8 habitat, but it's been in the habitat no so far
9 away onsite, the same site, iceplant. And where
10 iceplant occurs -- where it was looked for at
11 state park land on the southern end there, it
12 occurs in iceplant, too.

13 PRESIDING MEMBER KEESE: So you're not
14 sticking with A, which is a substantial adverse
15 effect on the species?

16 MR. ANDERSON: What I'm trying to say is
17 that any effect on habitat of an endangered
18 species would represent a significant or a
19 substantial adverse impact.

20 PRESIDING MEMBER KEESE: Okay. Sorry.

21 MR. ELLISON: Let me ask you this. Let
22 me focus on the population of snails that we have
23 identified at the location of Atascadero Road and
24 North Embarcadero. I'm referring to your kit fox
25 remarks here.

1 Are you testifying that those snails
2 that we've identified there use this three acres
3 of iceplant in the tank farm area?

4 MR. ANDERSON: No.

5 MR. ELLISON: Okay, so what you are
6 saying, if I understand you correctly, is that you
7 believe that the population might expand, that the
8 population might relocate, and some day there
9 might be occupation of that tank farm area, is
10 that a fair statement?

11 MR. ANDERSON: I'm saying that since
12 there have been snails found onsite, there could
13 be snails elsewhere on site very close. There
14 could be snails today in the tank farm site. It
15 hasn't been looked at for a year or two. Can't
16 remember the exact date of the surveys.

17 As long as it represents habitat that
18 could be occupied, we're not sure how the snails
19 are moving around. We're not sure of the closest
20 location of snails to the tank farm, other than
21 what was found on site.

22 MR. ELLISON: Well, we're going back
23 over old ground here again. This three acres has
24 been surveyed and no snails were found, correct?

25 MR. ANDERSON: That's correct.

1 MR. ELLISON: And in the future you're
2 requiring and Duke has agreed to have biological
3 monitoring to continue to look for snails in this
4 area, correct?

5 MR. ANDERSON: Yeah, prior to
6 construction.

7 MR. ELLISON: Okay.

8 MR. ANDERSON: That's because of its
9 possibility that they occur.

10 MR. ELLISON: Okay, so the issue of
11 looking for and protecting snails in case they are
12 in fact there is, in my mind, at least, a
13 different question than whether this habitat, as
14 it exists today, has an effect on the species.

15 And what I think you've testified to,
16 and I'm just trying to clarify the difference
17 here, is that you think this habitat is
18 significant within the meaning of CEQA, not
19 because the snails that we found use it, but
20 because it represents a potential place of
21 relocation or expansion for that population,
22 correct?

23 MR. ANDERSON: I think the iceplant is
24 occupy-able habitat. That even though the snail
25 wasn't detected, it may be there, it could be

1 there. It's going to be lost forever. So, it, to
2 me, is a loss of suitable habitat for the Morro
3 shoulder-band snail.

4 MR. ELLISON: So regardless of whether
5 the snails would ever use it, mainly because they
6 could use it, it's lost habitat and it has to be
7 compensated?

8 MR. ANDERSON: I don't understand your
9 distinction between could use it and whatever the
10 first thing you said. It sounded pretty much the
11 same. Can you repeat it? Do you recall it?

12 MR. ELLISON: Yeah, the question was
13 regardless of whether the snails currently use it
14 or will use it in the future, the mere fact that
15 they could, that this is habitat that they might
16 use, without any showing that they're likely to
17 use it, without any showing that they do use it,
18 is sufficient in your mind to require
19 compensation?

20 MR. ANDERSON: Well, we're using
21 essentially the same criteria that Dr. Huffman
22 used in talking about the snail out at Camp San
23 Luis Obispo site. And that is that where he's
24 found it, he looks at that and thinks about the
25 snail prefers those types of micro habitat

1 conditions.

2 And in the vicinity -- on the power
3 plant site, in the vicinity, those micro habitat
4 conditions include iceplant.

5 MR. ELLISON: This is not critical
6 habitat under the Endangered Species Act, right?

7 MR. ANDERSON: No, and it's been
8 recently discovered in iceplant. So, it's not
9 called or designated critical habitat yet.

10 MR. ELLISON: How common is iceplant
11 within the range of the snail, as you define the
12 range?

13 MR. ANDERSON: I don't know.

14 HEARING OFFICER FAY: Counsel, do you
15 have an estimate of how much more you have --

16 MR. ELLISON: Yeah, it's taken a lot
17 longer than I thought it would. I agree with
18 that. I'd like to think five minutes.

19 HEARING OFFICER FAY: You said another
20 five minutes?

21 MR. ELLISON: Yes.

22 Let me shift the topic here and see if
23 we can move quickly. Let me just -- Mr.
24 Okurowski, if you could just put -- I'd like to
25 talk about the disputed area of grassland -- if

1 you could just put a picture up of that. I
2 believe we have one.

3 Okay, how many acres are we talking
4 about here?

5 MR. ANDERSON: .3.

6 MR. ELLISON: This is not -- there's an
7 additional .33 that Duke and staff agree upon that
8 should be compensated. This is the grassland area
9 that is disputed, correct? Is that correct?

10 MR. ANDERSON: Well, I don't recognize
11 it exactly, but it's probably similar, or this
12 part that you're -- parcel that you're talking
13 about.

14 MR. ELLISON: Okay, let's just move on.
15 Now, the other thing I'd ask you about is that you
16 have identified an impact to the Creek bed, to the
17 riparian area as a result of both construction and
18 operation noise, among other things, correct?

19 MR. ANDERSON: Not to the Creek bed. To
20 the riparian strip, you know. I mean we never
21 said you're going to go in and rip out the
22 riparian area or disturb the Creek bed.

23 MR. ELLISON: To the riparian strip. On
24 what basis did you conclude that the noise from
25 the Morro Bay modernization project, the noise

1 impact from the modernization project on the
2 riparian strip would increase relative to the
3 noise that's there now?

4 MR. ANDERSON: In formal discussion with
5 one of our noise people about how far the existing
6 power plant is from the riparian area. And the
7 fact that the new power plant would be right
8 adjacent to it.

9 MR. ELLISON: Are you talking about Mr.
10 Buntin?

11 MR. ANDERSON: I can't remember if it
12 was Mr. Buntin or if it was somebody else at the
13 Energy Commission, Energy Commission Staff. But
14 we could ask Mr. Buntin about that. I do believe
15 I might have talked to him about it.

16 MR. ELLISON: I'd be happy to ask Mr.
17 Buntin about it if he's here. It's up to the
18 staff, if they want to put Mr. Buntin on, we can
19 talk to Mr. Buntin.

20 Surprise.

21 HEARING OFFICER FAY: Counsel, has Mr.
22 Buntin previously been sworn?

23 MS. HOLMES: He has. I'm not sure quite
24 what he's testifying to. It certainly wasn't
25 prefiled.

1 (Laughter.)

2 MR. ELLISON: Well, I recognize that
3 concern, and if counsel wants to object, that's
4 fine.

5 MS. HOLMES: If your question is to what
6 Mr. Anderson relied on, I think he's answered that
7 question. He believes he relied on a conversation
8 with Mr. Buntin.

9 Now, if the applicant wants to know what
10 Mr. Buntin -- I'm not going to object to it, I'm
11 just -- it's procedurally curious.
12 Whereupon,

13 JIM BUNTIN
14 was called as a witness herein, and having been
15 previously duly sworn, was examined and testified
16 further as follows:

17 CROSS-EXAMINATION

18 BY MR. ELLISON:

19 Q The question is, Mr. Buntin, did you do
20 an analysis of the noise impact of the project on
21 the riparian area that we're discussing?

22 MR. BUNTIN: I didn't prepare any
23 specific analysis of that, no.

24 MR. ELLISON: Okay. That's my only
25 question. Well, no, actually let me -- I'm

1 sorry --

2 (Laughter.)

3 MR. ELLISON: He's gone, I know. One
4 more question. It is true that you found in your
5 noise analysis of the project that the project
6 would not have a significant noise impact under
7 CEQA, and that it would comply with all applicable
8 laws, correct?

9 MR. BUNTIN: Yes. And that's in the
10 context of the human receivers.

11 MR. ELLISON: Okay. And was it not also
12 your testimony that the noise from the new project
13 would be less than the noise from the current
14 project?

15 MR. BUNTIN: I believe so, yes.

16 MR. ELLISON: And that includes at the
17 RV park, which is immediately across the riparian
18 area from where the new power plant will be,
19 correct?

20 MR. BUNTIN: I'd have to look at that
21 relative to -- I'm sorry, I don't have the table
22 in front of me, so I can't recall right offhand.

23 MR. ELLISON: The nearest receptor was
24 the RV park, was that not correct?

25 MR. BUNTIN: I know that was our

*****par 7 thank
you.

8 You also testified -- I'm sorry, this is

9 for Mr. Anderson -- you also -- thank you, Mr.

10 Buntin, that was --

11 Mr. Anderson, you also testified that, I
12 believe one place in your testimony, that you had
13 a concern about the air pollution impact on the
14 riparian area. What was your basis for that
15 concern?

16 MR. ANDERSON: I don't remember that
17 concern.

18 MR. ELLISON: Okay, are you willing --

19 MR. ANDERSON: We certainly didn't
20 mitigate for that, or ask or recommend mitigation
21 for that.

22 MR. ELLISON: Okay. And then there was
23 also a concern about lighting. Do you recall
24 that?

25 MR. ANDERSON: Yes.

1 MR. ELLISON: Okay. What was your basis
2 for the concern about lighting?

3 MR. ANDERSON: Well, often there's a
4 human concern about upward facing lights. But,
5 for wildlife, nighttime light affects those
6 species that are active at night. They're active
7 at night because they like the dark.

8 And so lighting very close to the
9 riparian strip, lots of lighting was considered to
10 be an impact.

11 MR. ELLISON: Did you assume, in making
12 that impact assessment, that there would be lots
13 of lighting next to the riparian area?

14 MR. ANDERSON: I assumed there would be
15 whatever lighting is required at a power plant,
16 which is much more than is currently there in the
17 tank farm area.

18 During construction, unless, you know,
19 it just seems like there will be -- every power
20 plant I've ever seen at night has quite a few
21 lights.

22 MR. ELLISON: Did you review the visual
23 resources conditions on lighting?

24 MR. ANDERSON: No.

25 MR. ELLISON: Okay. That's all I have,

1 thank you.

2 HEARING OFFICER FAY: Okay, we'll take a
3 break, ten-minute break, and keep it just to ten
4 minutes, please.

5 (Brief recess.)

6 HEARING OFFICER FAY: We're back on the
7 record now. CAPE, your cross-examination of
8 staff.

9 MR. NAFICY: Okay, I'm going to try to
10 keep this really short. I'm going to start
11 talking a little bit, asking some questions about
12 that access road that we previously talked about.

13 CROSS-EXAMINATION

14 BY MR. NAFICY:

15 Q Mr. Anderson, when you started doing
16 your CEQA analysis of the impacts of changes to
17 this road as a result of this project, did you use
18 the road as it existed when the AFC was filed?

19 A I used the road as it exists today. I
20 recall the road from the past, but I have no
21 pictures or anything to really relate it to today.

22 Q Okay. Now, are you aware of the City of
23 Morro Bay's position on this road? More
24 specifically, do you know if they wanted to have
25 this road paved?

1 A It's not really my area, but I do
2 believe that they were interested in paving the
3 road. They were interested in the bicycle path
4 and the pedestrian path.

5 Q Were they also interested in maintaining
6 the bridge on a permanent basis?

7 A Yes.

8 Q So, do you know why they were interested
9 in keeping the bridge on a permanent basis?

10 A I assume they were interested in the
11 pedestrian and the bicycle path that would be able
12 to cross at the bridge there and connecting north
13 and south of Morro Creek.

14 Q So, would that be to provide additional
15 access to pedestrians and bicycle riders?

16 A I have a feeling that's true.

17 Q Okay, now, in your analysis of this
18 issue do you believe that the paving of the road
19 and maintaining the bridge on a permanent basis
20 and providing the bicycle access, would that
21 increase or decrease the amount of human access to
22 the areas adjacent to this road?

23 A We felt that it would, that it would
24 definitely increase that human activity.

25 Q So this increase in human activity, is

1 that what you consider to be a significant impact?

2 A It could be if it affects sensitive
3 habitat or endangered species.

4 Q Do you believe that it would?

5 A Yes, we do. And that's why the fencing
6 was in -- we required fencing, and that's why the
7 fencing for the snowy plover was required, also.

8 Q Thank you. The other area I wanted to
9 ask you a little bit about has to do with your
10 analysis of cumulative impacts. On page 39 is, I
11 believe, where the analysis is.

12 Where it says, staff has determined that
13 terrestrial cumulative impacts are mitigable to
14 insignificant levels with the incorporation of
15 staff's and applicant's proposed mitigation.

16 Have the recent discoveries of shoulder-
17 band snails in various parts of Camp San Luis and
18 areas in the state parks, have those discoveries
19 changed your mind about whether the cumulative
20 impacts are significant or not?

21 A Well, we still feel that the impacts can
22 be mitigated. We do feel that there are
23 significant impacts resulting in, and I guess here
24 we say are mitigable to insignificant. I believe
25 we still believe that, they are mitigable to

1 insignificant impacts.

2 Q Well, I guess I was wondering has the
3 universe of the impacts you considered for your
4 cumulative impact analysis when this document was
5 put out, has that universe changed?

6 A Yes.

7 Q Okay. So, because of the changes in the
8 various impacts that we now know, would you say
9 that the cumulative impact is greater?

10 A Yes.

11 Q Okay. Now, besides the individual
12 mitigation measures that you've proposed in this
13 document, are there other mitigation measures that
14 may be appropriate, given the, you know, the fact
15 that according to your testimony the cumulative
16 impact now is of a greater magnitude?

17 A Well, because of the discovery of the
18 Morro shoulder-band snail at the satellite parking
19 area, and Camp San Luis, and the fact that the
20 results are not finalized from those studies nor
21 have they been analyzed, other agencies, as well
22 as ourselves, may make -- may agree on changes,
23 depending upon the results of the protocol
24 surveys.

25 It's possible that because of that

1 cumulative impacts would be considered increased
2 or greater.

3 Q So we just don't know what the answer to
4 that question is until all these additional
5 protocol surveys have been done, and we know
6 definitively what the population of the shoulder-
7 band snail is, is that correct?

8 A Yes.

9 Q Just the last area I wanted to ask you
10 about. There was a lot of discussion about
11 cumulative impacts -- I'm sorry, strike that --
12 about significance of the impact to potential
13 shoulder-band snail habitat. And I just wanted to
14 ask a couple of clarifying questions.

15 Given what we know now, you know, even
16 without the protocol surveys, but given what we
17 know now about the habitat requirements, discovery
18 of the new populations and individuals, would you
19 say that the entire Duke power plant now is
20 within, quote, "the range of shoulder-band snail?"

21 A Yes.

22 Q Okay, so in terms of doing CEQA analysis
23 and deciding whether the impact from the
24 terrestrial impact of the proposed project is
25 significant or not, would you say that the

1 proposed project will reduce the range of
2 shoulder-band snail?

3 A I'd say it would reduce the habitat
4 available to it.

5 Q Okay. Thank you.

6 A I guess that's the same thing.

7 MR. NAFICY: Nothing further.

8 HEARING OFFICER FAY: Okay. Does the
9 City have any questions?

10 MR. SCHULTZ: Yes, we've got a few.

11 CROSS-EXAMINATION

12 BY MR. SCHULTZ:

13 Q I'd like to ask you a couple questions
14 just about the conditions of certification. If
15 you could turn to page 3-48.

16 I guess before I ask you those questions
17 when I was questioning Dr. Huffman I was talking
18 about the area south of the Creek, west of the
19 plant. Are you aware that that area is owned by
20 the City in fee?

21 A As of today, yes.

22 (Laughter.)

23 BY MR. SCHULTZ:

24 Q Are you aware then, I think in previous
25 conversations with you, though, about the area in

1 front of the wastewater treatment plant at 41,
2 Atascadero and Embarcadero, that that area is
3 owned in fee by the City?

4 A Yes.

5 Q And then all that other general area
6 that we're talking about, are you aware that that
7 area has been entrusted to the City through the
8 Tidelands Trust, correct?

9 A Yes.

10 Q With regards to Bio-T-5 on 3-48, did you
11 have any problem with the City also being included
12 in there, along with the CDF&G and the USFWS for
13 review and comment on the proposed BRMIMP?

14 A No, not at all.

15 Q On page 3-50, also, then the same
16 question about the same BRMIMP, under verification
17 number 3, you would not have a problem there with
18 including the City of Morro Bay also for
19 appropriate agency to consult with about any
20 changes to the approved BRMIMP?

21 MS. HOLMES: I have to ask a question of
22 clarification. Are you asking whether or not the
23 City would have some sort of veto or approval
24 authority?

25 MR. SCHULTZ: No, only consultation.

1 MS. HOLMES: Thank you.

2 MR. SCHULTZ: I'm asking for review and
3 comment.

4 MR. ANDERSON: That would be fine.

5 BY MR. SCHULTZ:

6 Q Then on page 3-53, number 9 at the top
7 of that page, regarding the pruning and tree
8 removal, are you aware that the City has a tree
9 removal policy?

10 A No.

11 Q Would you have a problem with including
12 the City of Morro Bay as a review and comment
13 agency to make sure that that tree removal policy
14 is followed?

15 A No, that would be fine.

16 Q On page 3-56, under Bio-T-15, which is
17 the mitigation for impacts to snowy plover, it's
18 your understanding that the fencing will be placed
19 on either City-owned property or Tidelands Trust
20 property, is that correct?

21 A Yes.

22 Q And do you have a problem with including
23 the City as a agency that would also be consulted
24 on the placement and timing of the fencing?

25 A No, not at all.

Q And then my last one under the conditions of certification is Bio-T-17 in regards to the construction access road. Do you have a problem with the City being included in the consultation process?

A No.

Q My last two questions I have for you have to deal with the dirt road. I'll have you take a look at our Morro Bay coastal land use plan which has been designated exhibit 226.

I'd ask you first to state for the record when that was certified by the Coastal Commission, which is on page 2.

A October 1982.

Q And then if you could turn to page 2-11,
I believe I've marked it, the second, towards the

back,

page*****

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1 and where the second tab, page 4-85.

2 A I notice it's a dashed road, not a solid
3 road.

4 Q Okay. If you could read the two
5 paragraphs next to the tab on page 45 of exhibit
6 226, which is the local coastal plan.

7 A To myself or out loud?

8 Q Just to yourself, then I'll ask you two
9 questions.

10 A Okay. I'm not a very good reader, so.

11 (Pause.)

12 MR. ANDERSON: I've finished.

13 BY MR. SCHULTZ:

14 Q Do those two paragraphs, the first one
15 specifically, acknowledge the dirt road and
16 parking area adjacent to Morro Creek?

17 A Yes, it does.

18 Q And does the second paragraph
19 acknowledge a ped and bike bridge over Morro Creek
20 with enhanced lateral shoreline access?

21 A Yes.

22 MR. SCHULTZ: No further questions.

23 HEARING OFFICER FAY: Any redirect, Ms.
24 Holmes?

25 MS. HOLMES: Yes, a few questions.

REDIRECT EXAMINATION

BY MS. HOLMES:

Q Mr. Anderson, earlier this afternoon there was a discussion about the appropriate way to mitigate for impacts to degraded habitat. Do you recollect that discussion?

A Yes.

Q Is it staff's policy to allow degraded habitats to be mitigated by setting aside other degraded habitat in isolation, or does staff prefer to adjust for the degradation through the use of ratios?

A The latter. We would prefer to set aside very high quality habitat.

Q So the preference would be to set aside high quality habitat and to account for the degradation of the land that's being affected by adjusting the ratios?

A Yes.

Q Thank you. There was also some discussion earlier this afternoon about significance criteria. And you were referred to the CEQA checklist. Do you recollect that discussion?

A Yes.

1 Q Are those the only criteria that staff
2 uses in determining significance to biological
3 resources, or does staff use other statement for
4 the laws and policies?

5 A Well, we use others.

6 Q Do we include in that, do we include the
7 policies and the requirements stated in the
8 federal Endangered Species Act?

9 A Yes.

10 Q And do we include those other sections
11 of CEQA that talk about impacts, including
12 mandatory findings of significance?

13 A Yes, we do.

14 Q Lastly, with respect to the discussion
15 we had earlier this afternoon about noise, you
16 referenced a informal conversation that you had
17 with Mr. Buntin, I believe it was, with respect to
18 the noise impacts that you used in reaching your
19 conclusions.

20 With the understanding that you did not
21 ask him for a technical analysis, do you remember
22 generally what he told you about noise impacts on
23 the riparian habitat?

24 A Well, his analysis was done in regards
25 to human receptors, and so he didn't look at, you

1 know, the short distance between the new power
2 plant and the riparian area versus several hundred
3 yards from the existing power plant to the
4 riparian area.

5 I asked him, do you think this will be,
6 you know, louder or not. And he thought it could
7 be, but he wasn't sure. He hadn't analyzed it.
8 And so I think that, similar to what he said here,
9 he wasn't certain.

10 Q Thank you. And when you reached your
11 conclusion, did you consider the fact that some of
12 these noise impacts would be happening during
13 construction of the facility?

14 A Yes, I did.

15 Q And is it your understanding, based on
16 staff's noise testimony, that construction is
17 louder than plant operation?

18 A Yes.

19 Q And did you consider the fact that the
20 construction of the new facility would be taking
21 place during the time that the old plant was also
22 operating, or the existing plant is also
23 operating?

24 A Yes, I did.

25 Q And did you take into account the fact

1 that there would be noise impacts from the
2 demolition of the existing facility that would be
3 in combination with operation of the new facility?

4 A Yes.

5 MS. HOLMES: Those are all my questions.

6 HEARING OFFICER FAY: All right. Any
7 recross?

8 MR. ELLISON: Yeah, I'm afraid so.

9 RECROSS-EXAMINATION

10 BY MR. ELLISON:

11 Q Mr. Anderson, counsel asked you some
12 questions about other criteria than the CEQA
13 checklist that staff relies upon to determine
14 significance. Do you recall that?

15 A Yes.

16 Q And you mentioned the Endangered Species
17 Act, as well as certain mandatory findings of
18 significance under CEQA, do you recall that?

19 A Yes.

20 Q Is your requirement for compensation of
21 habitat, specifically the iceplant and the road,
22 were you relying upon the Endangered Species Act?

23 A I was thinking more in terms of CEQA
24 analysis. But since a number of the species
25 involved are federally listed, I was thinking that

1 any effect to those that are listed under the
2 federal Endangered Species Act would result in a
3 significant impact.

4 Q But significant under CEQA?

5 A Yes.

6 Q Not under -- the Endangered Species Act
7 was not the basis for your requirement that this
8 property be compensated, correct?

9 A Yes, I think that's correct.

10 Q Okay. And with regard to mandatory
11 findings of significance, were any of those
12 mandatory findings applicable to either of those
13 required compensations?

14 A Yes, I think so. I'll read it to you if
15 we get it here.

16 This is section 15-065, and under A it
17 says: One of the options is reduce the number or
18 restrict the range of an endangered, rare or
19 threatened species.

20 That seems, to me, what we're doing. It
21 seems to fit.

22 Q Okay, are we reducing the number by
23 paving the road?

24 A No, we're restricting the range of an
25 endangered species.

1 Q Okay. Is it your understanding that the
2 range -- let me ask you a question. When you
3 refer to range, I can envision two different kinds
4 of range. There's the range meaning the range
5 within which you should survey, that you should
6 look for the species.

7 And then there is a different kind of
8 range. The range within which species that have
9 been identified need that habitat because they use
10 it.

11 Do you have that distinction in mind?

12 A No.

13 Q Okay, let me try a different --

14 A I can -- range is used in a couple
15 different ways. It could be used for individual
16 species in the home range, the area that it
17 travels during its lifetime.

18 It can also be used as this is the range
19 of the species, and it shows a geographical
20 outline. That range doesn't identify just dots
21 where the species is. It has an outline that does
22 talk about the types of habitat situations that it
23 would occur in within that range.

24 In other words, probably wouldn't be in
25 downtown City of Morro Bay, because it wouldn't be

1 correct habitat.

2 Q Is it your understanding that the dirt
3 road that we're speaking of, as it presently
4 exists, or as it existed at the time the project
5 was first filed, is suitable habitat for the
6 snail?

7 A Well, there's two questions. The first
8 is as it was filed. My recollection is it was
9 narrower, so there was more habitat adjacent to
10 it. And --

11 Q I'm not talking about what's adjacent to
12 it, I'm talking about the road, itself. The area
13 that would be paved.

14 A I think the area that would be paved is
15 larger than the road that was there two years ago.
16 It's similar but a little bit smaller than the
17 road that -- a little bit larger than what the
18 road is that occurs there today.

19 Q Well, let me go back. The question was
20 do you think that that road is suitable habitat
21 for the snail, in its condition as a road?

22 A Not in its condition today.

23 Q Okay. And with respect to the iceplant,
24 let me ask you this. If there were the loss of
25 those three acres of iceplant on the power plant

1 site, would that create a shortage of suitable
2 habitat for the snail?

3 MS. HOLMES: This is getting awfully far
4 afield of my redirect.

5 MR. ELLISON: Well, redirect was about
6 mandatory findings of significance, and that's
7 what I'm exploring.

8 MS. HOLMES: Under that logic you could
9 open up the entire area for the entire topic of
10 all of the testimony for recross.

11 MR. ELLISON: Well, let me be clear. We
12 had a discussion about CEQA findings of
13 significance. He's testified about his reliance
14 upon that. Now he said on redirect that he also
15 relied upon the mandatory findings of
16 significance, so I have to explore that.

17 HEARING OFFICER FAY: All right, we'll
18 allow it, go ahead.

19 BY MR. ELLISON:

20 Q The question is would there be a
21 shortage of habitat for the snail with the loss of
22 those three acres?

23 A I have no way to know that, but my, you
24 know, my feeling is probably not. I mean we're
25 talking about a number of square miles, and this

1 is a small area, so it probably wouldn't create a
2 shortage, depending on how we define shortage.

3 Q Okay. Is it your understanding, is it
4 your interpretation of CEQA that any loss of
5 iceplant anywhere in the Chorro Valley triggers a
6 mandatory finding of significance?

7 A I wouldn't say that.

8 Q Okay.

9 MR. ELLISON: That's all I have.

10 HEARING OFFICER FAY: All right. CAPE,
11 any recross?

12 MR. NAFICY: I'm afraid so.

13 RECROSS-EXAMINATION

14 BY MR. NAFICY:

15 Q I'm intrigued by this notion of shortage
16 of habitat for an endangered species. Do you know
17 what the goal, Mr. Anderson, what is the goal of
18 the Endangered Species Act?

19 A It's to recover the species. It's also
20 to protect the existing endangered species.

21 Q So, is not protecting an endangered
22 species' habitat one of, if not the most
23 important, way of contributing towards recovery of
24 that species?

25 A Most often loss of habitat is a big

1 the solution.

2 MR. NAFICY: Nothing further.

3 HEARING OFFICER FAY: City of Morro Bay?

4 MR. SCHULTZ: No.

5 HEARING OFFICER FAY: No questions,
6 okay. Anything further, Ms. Holmes?

7 MS. HOLMES: Nothing further.

8 HEARING OFFICER FAY: Nothing further,
9 okay. All right.

10 COMMISSIONER BOYD: Question for the
11 City.

12 HEARING OFFICER FAY: Yes.

13 COMMISSIONER BOYD: Excuse me. As much
14 as I regret this, I want to return to the famous
15 or perhaps infamous dirt road for a moment.

16 A short time ago you produced a document
17 to the staff, local plan, and affirmed that the
18 dirt road was indicated on the map. And I believe
19 you said that document's dated 1982, 20 years ago?

20 MR. SCHULTZ: That's correct.

21 COMMISSIONER BOYD: How long is your
22 recollection, how long has this dirt road been in
23 existence? We know at least 20 years, but --

24 MR. SCHULTZ: I've been told up to 40
25 years before that, even.

1 COMMISSIONER BOYD: All right, second
2 question. Has there been any discussion to your
3 knowledge in the past of closing this road and
4 restricting access to this road?

5 MR. SCHULTZ: There's been no
6 discussions whatsoever by the City Council or
7 Planning Commission --

8 COMMISSIONER BOYD: Okay, --

9 MR. SCHULTZ: -- just the other way of
10 how to develop that. And there's many policies
11 that I'll get into tomorrow more than today in my
12 testimony that discuss the future of that area.
13 It's discussed in quite detail of a boat haul-out,
14 a boat facility, improving that area, the bridge,
15 realigning Coleman Drive to go behind Coleman
16 Park.

17 COMMISSIONER BOYD: I'll let you get
18 into that tomorrow then. One last question.
19 There's been some discussion about the width of
20 the road, and how in the past couple of years it's
21 gotten wider.

22 Do you have any opinions on why it's
23 gotten wider? Just increased use by the local
24 civilian population? Did it start out as a dirt,
25 a path sometime a long time ago, and it's just

1 gotten wider and wider with use?

2 MR. SCHULTZ: We do routine maintenance
3 on it depending on the budget. The last time it
4 was done I believe was just about two years ago,
5 year and a half ago. It's done every two, three,
6 and it might go four years, but we do do routine
7 maintenance on that. And issue a CDP permit and
8 go through an exemption for routine maintenance.

9 So when we do that, we do have, if you
10 look, if you go out there along the right-hand
11 side you'll see our manholes. And that's where we
12 try to at least have access to those manholes on
13 the right-hand side. And then the left-hand side
14 there's utilities. And that's kind of the
15 boundaries of where the City has determined that's
16 where the outside marker should be for those two
17 sides.

18 COMMISSIONER BOYD: Thank you. I'll
19 admit to being guilty to have driven on that dirt
20 road this morning, just to see the area, so, thank
21 you.

22 MR. SCHULTZ: You'll see manholes on the
23 right and you can see where there's utility lines
24 on the other side.

25 HEARING OFFICER FAY: Okay. That

1 concludes our taking of testimony on terrestrial
2 biology. I understand that California Department
3 of Fish and Game has a representative here. And
4 Ms. Holmes recommended that we get some comments.
5 Can that representative come forward?

6 Please, if you're comfortable at the
7 podium. Please introduce yourself.

8 MS. HILLYARD: My name is Deborah
9 Hillyard, and I did not come here today to provide
10 testimony on this project. However, we have been
11 working with staff over a long period of time.

12 I'd be happy to answer any questions the
13 Commission or staff or Duke has for us today. We
14 have worked with staff on terrestrial issues, and
15 the Department is preparing a letter in regards to
16 this project.

17 And my comments today will be restricted
18 to discussions that we've had in the past, and
19 staff recommendations to management in regards to
20 positions, but all of our final opinions about
21 this project, I think, will be forthcoming in a
22 letter.

23 HEARING OFFICER FAY: When is the letter
24 expected?

25 MS. HILLYARD: I believe it's in

1 Sacramento for review right now.

2 HEARING OFFICER FAY: So, in the next
3 few weeks?

4 MS. HILLYARD: Probably.

5 HEARING OFFICER FAY: Okay.

6 MS. HILLYARD: It is Sacramento, after
7 all.

8 HEARING OFFICER FAY: Mr. Ellison, do
9 you have any questions? Do you have any
10 questions?

11 (Laughter.)

12 HEARING OFFICER FAY: Ms. Holmes?

13 MS. HOLMES: Yeah, I just had a couple
14 of questions. I'd like to hand Ms. Hillyard a
15 copy of the FSA. And, Scott, on page 3-38 is the
16 biological resources table 3, compensation
17 calculations.

18 I just wanted to ask a couple of
19 questions. First of all, are those generally
20 consistent with your recollection of the
21 calculations that were discussed at the workshop
22 in March?

23 MS. HILLYARD: Yes. Myself and Bob
24 Stafford from the Department participated in the
25 workshop and this is a summary of the compensation

1 that we had discussed at that meeting.

2 MS. HOLMES: And generally speaking, are
3 those compensation levels consistent with general
4 California Department of Fish and Game policy?

5 MS. HILLYARD: Yes. We have provided
6 information based on projects that have been done
7 in the Morro Bay area. Specifically not in Morro
8 Bay, the City of Morro Bay, but south of the Bay,
9 itself, in Los Osos. We've been working
10 extensively on a habitat conservation plan for the
11 Morro shoulder-band snail and the dune system
12 there that includes a number of other sensitive
13 species.

14 And have processed several projects over
15 the last several years including the sewer project
16 for the community of Los Osos.

17 MS. HOLMES: So the compensation
18 requirements that are included in this table,
19 would it be fair to say that they're consistent
20 with the types of compensation requirements that
21 the Department of Fish and Game has recommended
22 for other similar projects?

23 MS. HILLYARD: Yes. The recommendations
24 that we brought forward at that meeting and which
25 are reflected in this document are based on

1 similar compensation ratios that have been
2 required for other projects in dune habitat in the
3 south part of the Bay area for Morro shoulder-band
4 snail, Morro blue butterfly, other species endemic
5 to the dunes in the vicinity of Morro Bay.

6 MS. HOLMES: Thank you. Those are all
7 of my questions.

8 HEARING OFFICER FAY: Okay. Do any of
9 the other parties have any questions while the
10 representative is here?

11 MR. NAFICY: I would like to ask a
12 couple. Have you been listening to this
13 conversation we've been having about CEQA
14 significance and whether the impact on the
15 shoulder-band snail habitat within the project
16 area is considered significant impact? Have you
17 been following that?

18 MS. HILLYARD: Yes, I have been
19 listening.

20 MR. NAFICY: Okay. I'm not going to go
21 through the formal process of questioning you.
22 Could you just comment on this discussion, and
23 maybe focus your comment on whether you believe
24 the potential impact on the three acres of the
25 iceplant that's within the range of the shoulder-

1 band snail would be significant consistent with
2 your understanding of the concept of significance
3 under CEQA?

4 HEARING OFFICER FAY: I'd like to modify
5 the question. Please answer in the Departmental
6 sense, as opposed to, you know, personal point of
7 view. You're not testifying as an expert witness,
8 but I think on behalf of Fish and Game, if you
9 can.

10 MS. HILLYARD: I can provide the
11 Department's position as it has been consistently
12 presented on projects in this area regarding Morro
13 shoulder-band snail.

14 We are a trustee agency under CEQA, and
15 so this is the kind of question, I think, that the
16 Department gets asked on a regular basis.

17 There are some guidelines in the CEQA
18 guidelines that identify how we're supposed to
19 address significance. And Mr. Ellison brought up
20 the checklist, which is typically used in order to
21 determine what kind of environmental document is
22 employed for analysis of a project.

23 There are some other guidelines which
24 identify how to evaluate impacts and determine
25 their significance, in addition to provide input

1 on appropriate mitigation and make determinations
2 about when impacts have been significant, have
3 been mitigated to a level of less than
4 significant.

5 One of the ones that we typically look
6 to consistently is the one that was cited earlier,
7 I think, the mandatory findings of significance.
8 Section 15063 or 15065, which identifies
9 significant reductions in fish and wildlife
10 resources that would include common species and
11 common habitats, as well as rare habitats.

12 It identifies significant effects on
13 terrestrial communities and aquatic systems. And
14 it also identifies reducing the range, or
15 restricting -- reducing the number or restricting
16 the range of rare, threatened or endangered
17 species, which is defined in another section.

18 So, any of the species that are listed
19 or proposed for listing, or considered to meet the
20 criteria for listing, of which there are a number
21 in this area, would fall under that category.

22 And in regards to what we consider to be
23 restricting the range of the species, if there is
24 habitat in an area where the species is known to
25 occur, whether it is snail or Morro blue

1 butterfly, or legless lizard, we would consider
2 that to be habitat. And that loss of that habitat
3 would constitute reducing the range and/or
4 restricting the number.

5 So, we would consider, because of
6 information that's come forward in the last
7 several years about the snail and other species,
8 that iceplant is considered to be habitat for the
9 snail. It's been found in veldt grass, as well as
10 iceplant, and some other non native species.

11 The range of that species in this area
12 is certainly considered to be from the dunes north
13 of the power plant to an area south of the power
14 plant where shells have been discovered by the
15 consultant, Dr. Huffman.

16 So, yes, I think that we would consider
17 most of the dune habitat that's in the area,
18 whether it's degraded by non native plants or not,
19 to be habitat. It's dune habitat; it has been
20 found to support species.

21 The surveys that were done are done at
22 one point in time, or if they're protocol surveys,
23 at five points in time. And oftentimes they will
24 pick up the most obvious locations of these
25 species, but it won't always pick up presence.

1 And it is certainly not very reliable to determine
2 absence. But it's the best tool we have in order
3 to determine the potential for the need for a
4 permit.

5 The surveys were specifically developed
6 to identify whether or not a federal permit would
7 be needed from U.S. Fish and Wildlife Service. So
8 it's one of the tools that we use in order to
9 determine whether or not species is present on the
10 area; whether it's suitable for that; and whether
11 or not an impact to that kind of a resource would
12 be significant.

13 MR. NAFICY: Thank you.

14 HEARING OFFICER FAY: Anything else?

15 How about the City? No questions, all right.
16 Thank you, Ms. Hillyard.

17 MS. HILLYARD: Thank you.

18 HEARING OFFICER FAY: Thanks for coming
19 and speaking to us.

20 Then I believe there's nothing further
21 on terrestrial biology except public comment. And
22 Mandy Davis had asked to make a public comment.
23 Mandy.

24 MS. DAVIS: Hi. I guess I don't need to
25 reintroduce myself. As the day has worn on, my

1 list has gotten longer and longer, and I've become
2 more and more brain dead, so hopefully I can make
3 some sense out of all of this.

4 I'll start with probably the simpler of
5 the issues that I wanted to address, which is the
6 last one. And I'm sorry, I don't believe I know
7 your name, but you asked a question about the
8 road.

9 And I understood, you know, the reason
10 why you asked it. I'm glad you went down it. The
11 road has been there, I guess, for a really long
12 time. But what we're looking at are impacts and
13 how to mitigate, et cetera.

14 That road, I have a four-wheel-drive
15 truck, and I happen to go in that area a lot. I
16 live locally. And it's a pain in the fanny. I
17 mean it is, even though they grade it, it is
18 washboarded; it has pot holes. Generally people
19 do not like to travel that road. It is traveled
20 very lightly by locals at best.

21 So, what would happen is if that is
22 graded further and/or if it's paved over, the
23 potential for impact is much higher. Because
24 right now, tourists don't go down that very often.
25 I mean, they turn around and their teeth are

1 getting jarred out. And, you know, it's
2 understandable that it's not traveled highly.

3 If it is paved for this project, the
4 amount of travel -- we have a lot of tourists that
5 go down the Embarcadero and head towards the Rock.
6 And instead of looking at that road and going, I
7 don't think so, a good portion of those people
8 probably are going to turn down it if it's paved.
9 And that will further impact that area. The
10 potential for impact is much greater than it is
11 now.

12 So if that was the point you were
13 getting to, it's very lightly traveled; not a lot
14 of people; and very few, if any, tourists go down
15 that thing currently. And it's been that way for
16 a pretty long time from what I understand.

17 So just thought I'd kind of sort of give
18 my input on that, because I think it was slightly
19 misrepresented.

20 Okay, so that was number five. This one
21 is an area that wasn't, when we had the workshop
22 it was a very long workshop. There was some
23 really important things that came out in the
24 workshop. And one of the things that did not, to
25 my satisfaction, because it went on and on and on,

1 was the impacts to the riparian zone.

2 And I've spent quite a bit of time in
3 that riparian zone. And for as small as the
4 riparian zone appears to be, it is incredibly
5 diverse. It's really a beautiful little area.
6 The diversity of plant life and animal life there
7 is pretty astounding.

8 I think that the impacts of the proposed
9 plant, and specially during the construction
10 phase, would be prohibitive to some of the,
11 especially the mammals, the avian species that are
12 there. It would be very destructive.

13 When you have the kind of construction
14 that would be going on there, which would be the
15 noise impacts, even some of the air pollution type
16 impacts, what would happen to that riparian area
17 would be almost insurmountable from a long-term
18 standpoint.

19 A good majority of the animals, the
20 mammals most specifically, would move out of the
21 area for that period of time because the baseline
22 noise and what they're used to is something that's
23 quite quiet and really kind of serene. It will no
24 longer be quiet and serene during that
25 construction period.

1 There are also impacts to nocturnal
2 critters, you know, the nocturnal species, owls, a
3 variety of things. This was one thing that was
4 not addressed during that workshop very much. And
5 this is an impact that could not only last through
6 the construction phase, but all the way into the
7 running of the plant. Because the plant will be
8 butted right up against that.

9 So what you would have is a tremendous
10 amount of long-term, very long-term impact to
11 nocturnal species. I'm really worried about that
12 riparian zone. I don't think it has been
13 addressed enough. And I would like the
14 Commissioners to recognize the importance of the
15 critters in that region. And what could happen to
16 it, especially during the construction phase. So
17 that was another issue I wanted to bring up.

18 The other issue, I'm going from simple
19 to the last one, you guys are going to start
20 rolling your eyes, but the third one I wanted to
21 bring up was I haven't heard a whole lot about --
22 I've done some work with EPA in the past. I
23 haven't really gone into what my background is,
24 because it's really not necessary. I'm not up
25 here as an expert, even though I do have a

1 biological background, and a background in
2 wildlife rehabilitation.

3 I have not heard, but having worked with
4 the EPA, I know that you can have all kinds of
5 regulations, but if implementation of those
6 regulations is not set in place, and you don't
7 have enough people, and it's not provided for, you
8 can have all the regulations in the world, and
9 it's not going to do diddly-squat.

10 So, what I'm really interested in is if
11 this project does go on, and the construction does
12 start, that implementation of the recommendations
13 and the mitigation measures that are set forth, be
14 really stringent.

15 And what I'm basically saying is that I
16 think it would be in everyone's best interest,
17 maybe not Duke's, but everyone else's best
18 interest that we have a very stringent monitoring
19 system.

20 I understand that some monitoring has
21 been recommended. And that there is going to be
22 an education program for the construction workers.
23 But, I'm sorry, you guys, I just cannot see that a
24 guy with a jackhammer, if he looks down and he
25 sees a snail down there, he is not going to look

1 down to even inspect it. And if it's under his
2 foot, you know, gosh darn it, the guy's going to
3 stomp on it, you know.

4 I'm not saying that all construction --
5 this is not something negative, but they're there
6 for a reason, and they're not going to monitor the
7 way that it needs to be monitored.

8 So, what I'm recommending is that you
9 have a very stringent monitoring, 24 hours, within
10 those areas that you have any impacts to any of
11 the endangered species. And I really haven't
12 heard that mentioned a whole lot. It may be
13 provided for, it's not something I'm aware of.

14 Okey-dokey. The very last thing that I
15 wanted to speak about, and I want to preface these
16 comments with I really honor what the staff has
17 done with, you know, the recommendations from a
18 terrestrial biology standpoint.

19 I also understand they are operating
20 within constraints. They are operating within the
21 constraints of the data that has been provided to
22 them by the APCD, by Duke, by any of the, you
23 know, basically any of the data that's out there.
24 They can only make the recommendations based on
25 that.

1 What I'm about to say is I understand
2 why they came to these conclusions, but I think
3 that maybe some of the conclusions were based on
4 insufficient data. And this has to do with
5 peregrine falcons.

6 I'm going to split this up into a couple
7 of different areas. Peregrine falcons, as you
8 probably know, are very very sensitive from a
9 cardiopulmonary, cardiorespiratory standpoint.

10 There are numerous papers that prove
11 this. They're general in nature, and they don't
12 cite very specific pollutants. But, you can well
13 understand that, you know, you could make a direct
14 correlation that if we are looking at higher
15 pollution levels, or higher ground level pollution
16 levels, that could significantly impact human
17 beings, that those impacts are going to be much
18 greater within the avian or especially within a
19 raptor community.

20 We have, as I'm sure you know, a couple
21 of mating pairs on the Rock. They've been there
22 for quite awhile. But under those circumstances
23 of the current plant, the way that it runs and the
24 kinds of pollution levels that are going out.

25 They did modeling during, you know, the

1 period where they were getting all the facts, et
2 cetera. And the modeling cited the Rock as having
3 the highest, and this is assuming the lower stack
4 heights on the proposed, not the current, but the
5 lower stack heights on the proposed plant, that
6 the highest pollution levels would be at the Rock.

7 Given that, that's a little scary to
8 begin with. But, unfortunately, they didn't go
9 one step further and take into consideration some
10 of the very specific wind conditions that we have
11 here on the Bay.

12 I live on a boat. I do some sailing.
13 Not as much as some of the people that I see
14 sitting right here. But, at any point in time
15 when you go out on that Bay and if you sail, you
16 are aware of some very -- the Rock has its own
17 climate. It has its own wind conditions.

18 The modeling did not take that into
19 consideration. What happens is you have dead air
20 on one side; it has a tendency to circle in a very
21 unusual way. But especially on the leeward side
22 you have a completely different kind of condition
23 that the modeling was set out, you know, to give
24 you the kind of information.

25 I think that that, if they had taken

1 into consideration, and I would like to recommend
2 that the modeling be redone, and some more
3 information be brought out on this, that they
4 would find that the pollution levels on that Rock
5 are even higher than what the models have shown.

6 If that is the case, the potential for
7 impact on peregrine falcons could be significant.
8 The other --

9 HEARING OFFICER FAY: Ms. Davis, I'm
10 sorry, I have to cut you off there. It's been
11 about 12 minutes, and we're running out of time
12 for the other members of the public who have --

13 MS. DAVIS: Okay.

14 HEARING OFFICER FAY: -- asked to be
15 able to make a comment. So I'm just going to have
16 to stop you right there.

17 MS. DAVIS: All right, well, I just --

18 HEARING OFFICER FAY: Now, Nelson
19 Sullivan --

20 MS. DAVIS: Thank you.

21 HEARING OFFICER FAY: -- is the next
22 one.

23 MS. HOLMES: Hearing Officer Fay, if I
24 could just interrupt for a second. We also have
25 somebody from State Parks, another state agency,

1 here.

2 HEARING OFFICER FAY: Do you also want
3 to ask questions of them?

4 MS. HOLMES: I believe he actually has
5 something to say on his own.

6 HEARING OFFICER FAY: Okay, all right.
7 Yes, sir, Mr. Sullivan.

8 MR. SULLIVAN: Good evening; you're
9 holding up well.

10 Earlier today when I didn't have a blue
11 card in, Duke's attorney made a point that when
12 the Diablo Canyon refueled they had to shut it
13 down.

14 Now, I know they had a lot of problems
15 when they designed and built that thing, but they
16 weren't stupid enough to shut the whole plant
17 down, when they've got two separate units.

18 So, when one unit shuts down to refuel,
19 you've got another unit there to supply the
20 electricity. And we certainly are not going to be
21 without electricity on this area of the coast with
22 that thing eight miles away from us, and able to
23 supply one-thirtieth of the state's electricity.
24 So we can get by with one-sixtieth, a piece of the
25 one-sixtieth.

1 Also there was another statement by Duke
2 a long way back in the process. And that was the
3 impingement of a very very small amount of fish on
4 the screens. And this completely ignores the
5 really spectacular slaughter of jellyfish that
6 occurs very occasionally in Morro Bay. We have a
7 bunch of jellyfish come in, and they shut the
8 plant down a year or so back there was so much.
9 They couldn't get enough water through the screen
10 because of all the jellyfish in it. So that,
11 Duke's data deserves scrutiny.

12 Thank you.

13 HEARING OFFICER FAY: Thank you for your
14 comment. Garry Johnson.

15 MR. JOHNSON: I forgot to say thank you
16 for coming here, other than us going to
17 Sacramento.

18 Can we put the map up, the one that the
19 City had of the area that shows Duke and the
20 beach?

21 HEARING OFFICER FAY: I'm sure we can.
22 Hold on just a minute.

23 MR. JOHNSON: Okay. While we're doing
24 that I do like to make a comment on lighting.
25 Yeah, Duke's going to have lighting out here. But

1 this whole city is lit up. The north Morro Bay,
2 you want to see lighting, go out there at night.
3 I mean we're out there at night in boats, and it
4 looks like a Christmas tree out there.

5 So you can't say that just Duke's
6 lighting is going to hurt the habitat of the area,
7 because north and south, the City, downtown and
8 everything is lit up pretty well. I only live a
9 couple blocks from here, and I can see the north
10 end pretty good.

11 Okay, I need a pointer, too, because
12 what I want to discuss, one of the things I did
13 when I retired, I joined the Audubon Society. And
14 I'm not speaking for the Audubon Society, but I'm
15 speaking as a member of the Audubon Society.

16 And once a year we do a December bird
17 count throughout the United States. And we're one
18 of the top five, sometimes the top three, for bird
19 species. And one area, the Cloisters, and that
20 sand dune between the Cloisters and to the beach
21 area, is a heavily populated western snowy plover.

22 And the comment was made do the white
23 snowy plover, are they down into this area. Well,
24 they may be, but it's really heavily inhabited by
25 people that come down there every day with their

1 dogs. And the dogs chase the birds. And the
2 birds, you don't see very many of them there
3 because some people don't believe in the leash
4 law.

5 But at this end here, the Audubon
6 Societies take it upon themselves to put signs up
7 to keep people off the sand dunes. They also have
8 problems with the equestrian people, because you
9 see a lot of horses down there.

10 So what they're trying to do now, during
11 the nesting season, is to keep the signs up and to
12 keep people off the beach area.

13 So, during the December bird count on
14 that Creek that we talk about, I believe that's
15 the Creek there, it's a very active Creek. It's
16 more or less pollutant free. There's a lot of
17 birds in there. We find a lot of different
18 species. We could find maybe ten species of birds
19 in that area. It's very healthy; the Creek is
20 healthy. There's birds in there, snipe birds.

21 The only pollution that we find is
22 debris that people have thrown in there under the
23 bridge. There's some homeless people that live
24 there occasionally. Because I belong to also the
25 Audubon Society, and every Monday we clean up

1 trash throughout the City. And we go down there
2 and we can pick up a bag or two, sometimes, on
3 weekends -- on Monday mornings. So, I say that
4 this is a healthy area.

5 Now, talking about snails, it's an
6 interesting subject. I've learned a lot today.
7 And I got a lot of snails at my house if anybody's
8 interested. I live about two blocks from here.

9 I'm kind of confused now after listening
10 to all this testimony about this snail that's on
11 the endangered species list. Because when I first
12 heard about it, it was in Los Osos. Then I find
13 out it's at Camp San Luis and it's in CalPoly, and
14 it's over here at this plant.

15 I'm not sure whether this is endangered
16 or not. More research has got to be done on this.
17 Because every time somebody wants to build
18 something they find this snail.

19 So, looking at it isometrically, the
20 snail can only, on this three-acre piece of
21 property, it can also go in this direction where
22 the homeowners live. And it would be an
23 interesting study to do a study on homeowner
24 population in this area to see if there's any
25 snails in the property owners' property.

1 Also, maybe we ought to stop all the
2 building on these sites that aren't built on yet
3 and do a study there. But it's an interesting
4 thing about this discussion on the snail.

5 Maybe because they can't find any snails
6 on this three-acre parcel because it's not a good
7 habitat for them. Because with the snail, itself,
8 on this iceplant, which is not native to this
9 area, that both parks, state parks that have the
10 snails on their property at the north and south
11 end, to me there's a potential problem there, too,
12 because the snails could get on the roads and get
13 run over, especially on highway 1.

14 So I think this is a bigger picture than
15 just looking at Duke. Maybe we better look at the
16 whole overall picture of Morro Bay.

17 I guess that's about all I have to say.
18 Thank you.

19 HEARING OFFICER FAY: Thank you for your
20 remarks. I understand we have someone from the
21 California Department of Recreation, or State
22 Parks who is going to make some comments.

23 Could you introduce yourself, sir,
24 please.

25 MR. WALGREN: Yeah, I'm Mike Walgren;

1 I'm with California State Parks, I'm a Resource
2 Ecologist. I wasn't anticipating making comments
3 today, but I'm a little bit concerned about some
4 of the discussion regarding the Morro shoulder-
5 band snail.

6 A little background: I've been involved
7 in the surveys that found several of these new
8 populations of snail. I'm just telling you that
9 because I know a little bit about these snails,
10 and there's been some comments today that are
11 cause for concern.

12 Just to remind everyone here, we're
13 dealing with a snail who has a large population
14 south of Morro Bay. Beyond that population, I'm
15 aware of only four known locations where this
16 exists.

17 One of them is where Duke plans to have
18 their satellite parking area. One of them is
19 where Duke plans to have their laydown area. And
20 one of them is next to the power plant.

21 So, let's not be confused. There's only
22 five known life populations. It's an endangered
23 species. It is very rare.

24 What are their habitat requirements?
25 I've heard comments about certain things not being

1 important habitat. Well, about six months ago, or
2 maybe a little bit more, I was told that this
3 snail occurred primarily on a single species of
4 plant, and that's just been totally debunked.

5 My point is we don't know much about
6 this species. And we are being entrusted to
7 protect the species.

8 The habitat requirements are not well
9 known. We don't know what the good quality of
10 habitat is. We thought we knew, but we don't.

11 We were told recently that we knew a lot
12 of things about snails that have been proven to be
13 untrue recently. And so my point is we don't know
14 very much about this, so let's be safe rather than
15 sorry.

16 Another comment on the road. There's a
17 proposal to do a permanent road with a bridge over
18 the Creek. I would like to suggest that the
19 impacts of this road are potentially very
20 significant due to increased traffic from humans,
21 dogs, and general recreational use.

22 Some species may not have been mentioned
23 today that occur in those immediate adjacent
24 dunes. These include the Morro shoulder-band
25 snail, the Morro blue butterfly, the globos dune

1 beetle, which is found immediately adjacent to
2 this proposed road, as documented by an
3 entomologist hired by Duke. The coast horned
4 lizard, arid -- and potentially other species.

5 Edge effects are a phenomenon that's
6 well documented in scientific literature. When
7 you bring in a road or a home, you have edge
8 effects on the area around it. And that's a major
9 concern with this road.

10 I've heard reference to the snail
11 occurring .9 of a mile north of the road. That's
12 where State Parks found it. That doesn't mean
13 that they're not in the dunes immediately next to
14 Morro Creek. As far as I'm aware, that's not been
15 surveyed.

16 And finally, going to the snowy plover
17 issue, I heard a proposal that snowy plover
18 monitoring be done for five years. And that we
19 see if any nests come in. I would suggest that
20 that's not acceptable.

21 This does not address the needs of State
22 Parks. We are responsible landowners in this area
23 where increased traffic will be coming. And after
24 five years, we're still responsible for snowy
25 plovers, regardless of if there's any nests south

1 of there.

2 In addition, looking for five years to
3 see if a nest comes in is not a good way to go
4 about this. There are events, for example, if the
5 beach changes due to a storm. It might wash out
6 the beach; it might not be suitable habitat for
7 five years. On the sixth year it might be
8 suitable habitat.

9 There are changes over time. The birds
10 may not use it for one reason or another, and they
11 may come in later.

12 And finally, this habitat is foraging
13 habitat. We're not just talking about nesting.

14 So that's all I have to say, thank you.

15 HEARING OFFICER FAY: Thank you for your
16 comments.

17 Okay, as far as I know that concludes
18 all our testimony and comments on terrestrial
19 biology. Is there anything further from anybody
20 on that?

21 All right, thank you. We are off the
22 record.

23 (Whereupon, at 6:00 p.m., the hearing
24 was adjourned, to reconvene at 9:00
25 a.m., Wednesday, June 5, 2002.)

CERTIFICATE OF REPORTER

I, JAMES RAMOS, an Electronic Reporter,
do hereby certify that I am a disinterested person
herein; that I recorded the foregoing California
Energy Commission Hearing; that it was thereafter
transcribed into typewriting.

I further certify that I am not of
counsel or attorney for any of the parties to said
hearing, nor in any way interested in outcome of
said hearing.

IN WITNESS WHEREOF, I have hereunto set
my hand this 10th day of June, 2002.

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